

1979-1980 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. Elections

1. *Remedies for Employer Unfair Election Practices: NLRB v. Chatfield-Anderson Co.**

An employer's pre-election unfair labor practices may render a union representation election invalid and may also prevent the holding of a fair second election within a reasonable period of time. When a fair election is precluded by an employer's actions, union authorization cards obtained without misrepresentation or coercion may provide a more accurate indication of a union's majority status than the tainted election. Consequently, where the National Labor Relations Board (Board) finds that an employer has acted unfairly during an election period, it may ignore the election results and order bargaining on the basis of authorization cards, provided the Board also finds that the employer's conduct makes holding a fair second election in the near future impossible.¹ In *NLRB v. Gissel Packing Co., Inc.*,² the Supreme Court held that it was for the Board rather than for the courts to determine the effects of unfair labor practices upon the election process, and that the courts should give the Board's choice of remedy special respect.³

Nevertheless, during the *Survey* year, *NLRB v. Chatfield-Anderson Co.*,⁴ the Ninth Circuit, while affirming the Board's order to set aside an election because of the employer's violations of section 8(a)(1) of the National Labor Relations Act (Act),⁵ overturned the Board's bargaining order and instead ordered a new election.⁶ The court took this action because it disagreed with the Board's conclusion regarding the effect of the violations upon the future prospects for a fair election.⁷ The case is significant because the court, despite the holding in *Gissel*, substituted its own judgment for that of the Board, both in

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¹ According to the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), upon a finding of an unfair labor practice, the Board is empowered to "take such affirmative action . . . as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c). In *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 610 (1969), the Court held that the Board's remedies included the issuance of a bargaining order.

² 395 U.S. 575 (1969).

³ *Id.* at 612 n.32. The Court stated:

It is for the Board and not the courts, however, to make the determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

Id.

⁴ 606 F.2d 266, 102 L.R.R.M. 2576 (9th Cir. 1979).

⁵ *Id.* at 268, 102 L.R.R.M. at 2578. Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

⁶ 606 F.2d at 268-69, 102 L.R.R.M. at 2578.

⁷ *Id.*

its characterization of the seriousness of the unfair labor practices committed, and in its conclusion as to the possibility of conducting a fair second election.

In *Chatfield-Anderson*, the union had petitioned the Board for an election after the company refused to recognize the union as the employees' bargaining representative even though the union had obtained authorization cards from a majority of employees.⁸ During the following month, the company's senior executives and supervisory personnel engaged in a series of practices designed to inhibit employee support of the union. These practices included interrogating employees about their union activities and sympathies, threatening plant closure, imposing strict work rules, and withholding contemplated raises and bonuses.⁹ Additionally, management promised retroactive raises "after the union was out of the picture,"¹⁰ threatened to prolong negotiations with the union, and announced an open door policy to improve communication between employees and management.¹¹ The union lost the election and both sides filed allegations of unfair labor practices with the Board.¹² The Board decided that the company had violated section 8(a)(1) of the Act,¹³ and that the violations precluded the holding of a fair second election within a reasonable period of time.¹⁴ Therefore, on the basis of the number of authorization cards the union had obtained, the Board ordered the company to recognize and bargain with the union.¹⁵

The case came before the Ninth Circuit Court of Appeals on application of the Board for enforcement of its orders.¹⁶ The court first concluded that there was substantial evidence in the record to support the Board's findings of section 8(a)(1) violations.¹⁷ The court went on to find, however, that the circumstances of the *Chatfield-Anderson* case did not warrant the Board's imposition of a bargaining order.¹⁸ In reaching its decision, the court relied upon the Supreme Court's opinion in *Gissel*.¹⁹ The court noted that *Gissel* had identified three categories of pre-election wrongful employer conduct: (1) exceptional cases in which a bargaining order definitely was warranted because of extreme and pervasive unfair labor practices; (2) less serious cases in which a bargaining order still was appropriate because employer practices undermined the union's majority status and interfered with the conduct of a fair election; (3) minor cases in which a bargaining order was not warranted because of the minimal effect of the unfair labor practices.²⁰ Based on its review of the Board's decision, the

⁸ *Id.* at 267, 102 L.R.R.M. at 2577.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Chatfield-Anderson Co., Inc.*, 236 N.L.R.B. 50, 50, 98 L.R.R.M. 1190, 1191 (1978).

¹⁴ *Id.* at 51, 98 L.R.R.M. at 1192.

¹⁵ *Id.*

¹⁶ *NLRB v. Chatfield-Anderson Co., Inc.*, 606 F.2d at 267, 102 L.R.R.M. at 2577.

¹⁷ *Id.* at 268, 102 L.R.R.M. at 2578. The court characterized threats of adverse economic consequences as "among the clearest forms of unfair labor practices." *Id.* at 267-68, 102 L.R.R.M. at 2577-78.

¹⁸ *Id.* at 269, 102 L.R.R.M. at 2579.

¹⁹ *Id.* at 268-69, 102 L.R.R.M. at 2578.

²⁰ *Id.* at 268, 102 L.R.R.M. at 2578 (discussing *Gissel*, 395 U.S. at 613-15).

court concluded that the Board had characterized the Chatfield-Anderson violations as falling within the second *Gissel* category.²¹ The court disagreed with the Board's characterization, however, and decided that the violations were outside the scope of both of the *Gissel* categories in which a bargaining order was warranted.²² In the court's opinion, the coercive effects of the employer's unfair labor practices could be overcome.²³ The court stated that the effects of the more severe violations, such as threats of plant closure, were mitigated by the president's eventual disavowals, and that the other violations were "almost trivial."²⁴

The *Chatfield-Anderson* case shows a continued willingness in the Ninth Circuit to examine closely Board determinations that bargaining orders are necessary to remedy pre-election unfair labor practices.²⁵ After stating that it would not serve as a "rubber stamp" for Board decisions, the court proceeded to consider both the seriousness of the pre-election unfair labor practices and the possibility of remedying the violations.²⁶ The court's focus upon remedying unfair labor practices that have tainted an election is consistent with its view that bargaining resulting from a fair election is more desirable than a bargaining order based upon authorization cards.²⁷

In keeping with its preference for elections, as opposed to bargaining orders, as the better method for employees to express their desires, the Ninth Circuit, even before *Chatfield-Anderson*, had shown a willingness to look closely at all of the circumstances surrounding the unfair labor practices at issue. In *NLRB v. Western Drug*,²⁸ for example, the court reversed a Board decision to issue a bargaining order,²⁹ and criticized the Board for "mechanically appl[ying]" the *Gissel* criteria.³⁰ In *Western Drug*, the employer docked wages,

²¹ *Id.* The court criticized the Board's decision for its lack of specificity. *Id.* The court noted that the Board characterized Chatfield-Anderson's violations as "pervasive" and "sometimes flagrant," but did not take this as proof that the Board placed the case within the first *Gissel* category. *Id.* Instead, in the court's view, the Board's concern with the union's card majority status indicated that the Board placed the violations within the second category. *Id.*

²² *Id.*

²³ *Id.* at 269, 102 L.R.R.M. at 2578.

²⁴ *Id.* The court agreed with Member Murphy's dissent in the Board decision, 236 N.L.R.B. 50, 52-53, 98 L.R.R.M. 1190, 1192-93 (1978), that the president of the company had reduced the impact of supervisors' threats of plant closure by expressly disavowing any intent to close the plant. 606 F.2d at 269, 102 L.R.R.M. at 2578.

²⁵ See, e.g., *NLRB v. Western Drug*, 600 F.2d 1324, 1327, 101 L.R.R.M. 3023, 3025 (9th Cir. 1979); *NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 220, 99 L.R.R.M. 3022, 3025 (9th Cir. 1978). Other circuits have similarly shown a willingness to scrutinize closely bargaining orders. See, e.g., *NLRB v. Lloyd Wood Coal Co., Inc.*, 585 F.2d 752, 757, 100 L.R.R.M. 2028, 2032 (5th Cir. 1978) (employer unfair labor practices not so serious and extensive so as to support a bargaining order); *First Lakewood Associates v. NLRB*, 582 F.2d 416, 423-24, 99 L.R.R.M. 2192, 2198 (7th Cir. 1978) (Board's conclusion that the employer's serious and pervasive violations make a fair election unlikely is unsupported by specific findings).

²⁶ 606 F.2d at 268, 102 L.R.R.M. at 2578.

²⁷ *Id.*

²⁸ 600 F.2d 1324, 101 L.R.R.M. 3023 (9th Cir. 1979).

²⁹ *Id.* at 1327, 101 L.R.R.M. at 3025.

³⁰ *Id.* at 1326, 101 L.R.R.M. at 3024.

reduced working hours, threatened and interrogated employees, promised benefits, and solicited grievances in response to union organizing efforts.³¹ Although the court agreed with the Board that the employer's misconduct was serious enough to place the violations potentially within the second *Gissel* category,³² the court determined that a second fair election could be held.³³ Since the employees affected by the unfair labor practices voluntarily had left their employment for reasons unrelated to the employer's violations, and because there was no indication that prior violations continued to affect current employees, the court felt that a bargaining order was not warranted.³⁴

While *Chatfield-Anderson*, and its predecessor *Western Drug*, were both correct in their view that bargaining resulting from a fair election is preferable to the use of authorization cards,³⁵ the *Chatfield-Anderson* opinion can be criticized for its substitution of the court's judgment for that of the Board majority. As justification for its extensive review of this case, the court cited the Board's failure to state specifically its reasons for concluding that a bargaining order was necessary.³⁶ While it is true that the Board did not identify plainly the *Gissel* category in which the case fell, the Board did explain why it decided that some of the violations were serious and could not be remedied by a second election. For example, the Board concluded that because the president of the company previously had made numerous unlawful statements, his assurances that the plant would not be closed could not erase effectively the earlier threats of plant closure.³⁷ Moreover, the Board considered that threats of plant closure, along with other threats of economic retaliation, such as the withholding of raises, the cessation of the pension and profit-sharing plans, the prolonging of negotiations, and the denial of overtime, represented pervasive and flagrant violations of section 8(a)(1).³⁸ While these statements of the Board are certainly conclusory, the Supreme Court has held that it is for the Board to determine the effects of unfair labor practices.³⁹ In light of the broad discretion granted to the Board, it would have been appropriate for the Ninth Circuit to remand the case to the Board for substantiation of its conclusions.⁴⁰ Instead of remanding the case, however, the *Chatfield-Anderson* court merely substituted its own analysis of the facts for that of the Board, and concluded that the employer's violations were either minor or remediable through a second election.⁴¹ It is dif-

³¹ *Id.* at 1325, 101 L.R.R.M. at 3024.

³² *Id.*

³³ *Id.* at 1326, 101 L.R.R.M. at 3024.

³⁴ *Id.* at 1326-27, 101 L.R.R.M. at 3024-25.

³⁵ See, e.g., *Gissel*, 395 U.S. at 603, wherein the Court stated that authorization cards were "admittedly inferior to the election process."

³⁶ 606 F.2d at 268, 102 L.R.R.M. at 2578.

³⁷ 236 N.L.R.B. at 51 n.6, 98 L.R.R.M. at 1192 n.6.

³⁸ *Id.* at 51, 98 L.R.R.M. at 1192.

³⁹ *Gissel*, 395 U.S. at 612 n.32. See text and note at note 4 *supra*.

⁴⁰ See *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-44 (1965). The Supreme Court stated that it was appropriate to remand the case to the Board because the Board failed to articulate reasons for its decision which would enable proper judicial review. *Id.*

⁴¹ 606 F.2d at 269, 102 L.R.R.M. at 2578.

ficult to reconcile the court's action with the Supreme Court's statement in *Gissel* that deference is to be afforded to Board determinations regarding the effects of unfair labor practices.⁴²

As the *Chatfield-Anderson* case indicates, the labor practitioner should be aware of the strong preference of the courts for the holding of fair elections instead of relying upon union authorization cards in establishing a bargaining relationship. This decision points out the extreme importance of articulating as specifically as possible the reasons that the holding of a fair election would be impossible following pre-election unfair labor practices. When the Board's findings consist of merely conclusory statements, there is created a definite tension between the court's standard of review, which requires that Board findings be supported by substantial evidence on the record as a whole,⁴³ and the requirement that deference be given to the Board's determination of the effects of unfair labor practices. In the absence of reasoned decision making by the Board, the court cannot determine that the Board adequately weighed the effects of unfair labor practices, so as to meet the substantial evidence standard of review. Therefore, unless the practitioner prevails upon the Board to explain why certain unfair labor practices prevent the holding of a fair election, he is inviting a reviewing court to overturn a bargaining order based upon the determination that the Board's findings are inadequately supported.

B. Bargaining Unit Determination

1. *University Faculty: NLRB v. Yeshiva University**

The National Labor Relations Board (Board) first asserted jurisdiction over a labor dispute at a university in 1970.¹ Within a year of that decision, the Board approved the formation of a bargaining unit composed of university faculty members.² At that time, the Board reasoned that a unit made up of faculty members was appropriate because professional employees were included expressly within the statutory coverage of the National Labor Relations Act (Act),³ and because the policymaking and quasi-supervisory authority

⁴² 395 U.S. at 612 n.32.

⁴³ 29 U.S.C. § 160(c) (1976).

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¹ Cornell University, 183 N.L.R.B. 329, 334, 74 L.R.R.M. 1269, 1275 (1970).

² C.W. Post Center of Long Island University, 189 N.L.R.B. 904, 905, 77 L.R.R.M. 1001, 1003 (1971).

³ *Id.* (citing National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976)). Section 2(12) of the Act, 29 U.S.C. § 152(12), indicates that an employee is not to be excluded from the Act's coverage simply because he is a professional. The section provides in part:

The term "professional employee" means — (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized

exercised by the full-time faculty as a group did not make them supervisors or managerial employees.⁴ The Board soon developed a three part rationale for including faculty members within a bargaining unit: (1) faculty authority is exercised collectively rather than individually; (2) ultimate authority for university decision-making rests with the board of trustees rather than with the faculty; and (3) faculty members advocate their own interests rather than the interests of management.⁵ During the *Survey* year, however, in *NLRB v. Yeshiva University*,⁶ the United States Supreme Court held that the full-time faculty members of Yeshiva University are managerial employees, and therefore are excluded from the categories of employees entitled to protection under the Act.⁷ While the holding of the Court should be limited to the fact situation present at Yeshiva, the decision can be expected to have a widespread impact upon faculty unionization at many universities.⁸

Yeshiva was a private university operating eight graduate and five undergraduate schools.⁹ On October 30, 1974, the union filed a representation petition with the National Labor Relations Board seeking certification as the bargaining agent for the full-time faculty members at ten of the thirteen schools.¹⁰ The university opposed the petition on the ground that its faculty members were managerial or supervisory personnel, and thus were not covered employees under the Act.¹¹ Hearings before a Board-appointed hearing officer revealed that a central administrative hierarchy served all of the schools, with

intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes

Id.

⁴ 189 N.L.R.B. at 905, 77 L.R.R.M. at 1003. The Act provides that an employer need not deem a supervisor as an employee. 29 U.S.C. § 164(a). The term supervisor is defined in 29 U.S.C. § 152(11) to mean:

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.

⁵ See, e.g., *Northeastern University*, 218 N.L.R.B. 247, 250, 89 L.R.R.M. 1862, 1867 (1975); *University of Miami*, 213 N.L.R.B. 634, 87 L.R.R.M. 1634, 1637 (1974); *Tusculum College*, 199 N.L.R.B. 28, 29-30, 81 L.R.R.M. 1345, 1347 (1972).

⁶ 444 U.S. 672 (1980). The Supreme Court ruled that managers were not covered under the Act in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974).

⁷ 444 U.S. at 679.

⁸ See *id.* at 690 n.31. In justifying its determination of an appropriate bargaining unit, the Board stated that the role and authority of Yeshiva's faculty in relation to hiring, promotion, salary increases, granting of tenure and other areas of governance was not significantly different from that of other university faculties in which the Board had certified a representative union. *Yeshiva University*, 221 N.L.R.B. 1053, 1054, 91 L.R.R.M. 1017, 1018 (1975). While the Board may refine its analysis in future decisions according to the factors stressed by the Court, it also can be expected that universities will emphasize the similarities between their institutions and Yeshiva.

⁹ 444 U.S. at 674.

¹⁰ *Id.*

¹¹ *Id.* at 675.

ultimate authority vested in the board of trustees.¹² The central administration formulated university-wide policies, including general guidelines as to teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits.¹³ The budget for each school was drafted by its dean or director, subject to approval by the president.¹⁴ The individual schools within the university were headed by a dean or director, and, beyond the limitations described above, their operations were substantially autonomous.¹⁵

The hearing officer also found that faculty members at each school formally and informally met to determine matters of institutional and professional concern.¹⁶ Most of the schools had faculty committees concerned with various areas of educational policy.¹⁷ These committees effectively determined each school's curriculum, grading system, admission and matriculation standards, academic calendar, and course schedule.¹⁸ Faculty welfare committees negotiated with administrators regarding salary and conditions of employment.¹⁹ Faculty members also made recommendations to the dean or director concerning faculty hiring, tenure, sabbaticals, termination, and promotion.²⁰ Although the central administration made the final decisions on these issues based upon the advice of the dean or director, most faculty recommendations were followed.²¹

In light of these facts, the Board, in December, 1975, granted the union's representation petition and directed an election in a bargaining unit consisting of full-time faculty members.²² The Board rejected the university's contention that the faculty members were managerial and supervisory personnel and concluded instead that they were professional employees covered under the Act.²³ In rejecting the university's position that faculty members should be excluded under the Act, the Board reasoned, as it had in the past, that faculty decisions were made on a collective rather than an individual basis, that faculty members acted in their own interest rather than in the interest of the employer, and that final decision-making authority rested with the board of trustees rather than

¹² *Id.* Members of the board of trustees, with the exception of the president, did not hold administrative positions at the university. *Id.* Four vice presidents oversaw medical affairs and science, student affairs, business affairs, and academic affairs. *Id.* An executive council of deans and administrators made wide-ranging recommendations to the president. *Id.*

¹³ *Id.*

¹⁴ *Id.* Senior professors or department chairmen in some of the schools prepared budget requests which were almost always approved by the school's dean or director. *Id.* These professors were included within the bargaining unit. *Id.* at n.3.

¹⁵ *Id.* at 676.

¹⁶ *Id.* The only university-wide faculty body was the faculty review committee composed of elected representatives who adjusted grievances through informal negotiations and who made formal advisory recommendations to the president or the dean of the affected school. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 677.

²¹ *Id.*

²² Yeshiva University, 221 N.L.R.B. 1053, 1057, 91 L.R.R.M. 1017, 1021 (1975) (direction of election omitted). The unit included assistant deans, senior professors, department chairmen, associate professors, assistant professors, and instructors. *Id.*, 91 L.R.R.M. at 1021.

²³ *Id.* at 1054, 91 L.R.R.M. at 1018.

with the faculty.²⁴ The Board found no significant difference between faculty roles at Yeshiva and at other universities where the Board previously had concluded that faculty members were covered under the Act.²⁵

The union won the ensuing election and was certified by the Board.²⁶ The university again asserted that the faculty members were managerial employees and refused to bargain.²⁷ In an unfair labor practice proceeding brought by the union, the Board ordered the university to bargain with the union.²⁸ When the university again refused to negotiate with the union, the Board sought enforcement in the Court of Appeals for the Second Circuit.²⁹ The Second Circuit, however, refused to enforce the Board's order, concluding that the faculty, though professional employees under section 2(12) of the Act, nevertheless enjoyed managerial status, and thus were excluded from coverage.³⁰ The Board then appealed to the United States Supreme Court, but the Court affirmed the decision of the Second Circuit.³¹

Before the Court, the Board argued as part of its rationale for the inclusion of university faculty under the Act that the straightforward test of managerial authority normally used by the Court could not be applied because professional employees often appeared to be acting on behalf of management when they were in fact performing routine job duties.³² Therefore, the Board contended that it was necessary to apply an "alignment with management" test,³³ which looked to whether a group of professional employees exercised its decision-making authority in its own interest or on behalf of the employer. Using this test, the Board asserted that it was reasonable for it to conclude that the Yeshiva faculty was not aligned with management because the faculty exercised independent judgment rather than conforming to management policies and because its members were not evaluated according to their ability to effectuate management positions.³⁴ In its argument before the Court, the Board stressed that one of the policy reasons behind excluding supervisory and managerial employees from the Act's coverage was the danger that these personnel would assert union interests rather than representing management concerns.³⁵ In the Board's view however, faculty unionization at Yeshiva would

²⁴ *Id.*

²⁵ *Id.* See note 5 and accompanying text *supra*. Decisions that the university sought to distinguish were: *Northeastern University*, 218 N.L.R.B. 247, 89 L.R.R.M. 1862 (1975); *University of Miami*, 213 N.L.R.B. 634, 87 L.R.R.M. 1634 (1974); *Adelphi University*, 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972); *Fordham University*, 193 N.L.R.B. 134, 78 L.R.R.M. 1177 (1971); *C.W. Post Center of Long Island University*, 189 N.L.R.B. 904, 77 L.R.R.M. 1001 (1971).

²⁶ 444 U.S. at 679.

²⁷ *Id.*

²⁸ 231 N.L.R.B. 597, 600 (1977). The Board granted a motion for summary judgment, holding that all of the issues raised by the university were or could have been litigated in the prior representation proceeding. *Id.* at 598, 96 L.R.R.M. at 1602.

²⁹ *NLRB v. Yeshiva University*, 582 F.2d 686, 688 (2d Cir. 1978).

³⁰ *Id.* at 697-98, 703.

³¹ *Yeshiva University*, 444 U.S. at 691.

³² *Id.* at 683-84.

³³ *Id.* at 684.

³⁴ *Id.*

³⁵ *Id.*

present no danger of divided loyalty between the union and the administration because the faculty was expected to pursue independent professional values rather than to advocate university interests.³⁶

The majority opinion, written by Justice Powell, rejected the Board's contentions.³⁷ Instead it centered on whether the faculty members at Yeshiva were "managerial employees."³⁸ The Court defined managerial employees as those who "formulated and effectuated management policies by expressing and making operative the decisions of their employer."³⁹ As a result of this definition, the Court rejected the Board's argument that the status of professional employees should be determined according to the "alignment with management" test.⁴⁰ The Court was critical of the "alignment with management" rationale because the Court did not consider the interests of the faculty and administration to be separable.⁴¹ According to the Court, both groups pursued common goals of academic excellence and institutional distinction.⁴² The Court also disputed the Board's assertion that the divided loyalty of the faculty between the union and the administration was not a problem.⁴³ The Court stated that the faculty's professional expertise was necessary in order to formulate and implement academic policy.⁴⁴ The Court reasoned that the Yeshiva faculty members were managerial employees because they exercised authority that would be considered managerial in any other context.⁴⁵ The Court analogized the situation at Yeshiva to an industrial model, stating that the faculty determined within each school "the product to be produced, the terms upon which it will be offered, and the customers who will be served."⁴⁶

Four Justices joined in a dissenting opinion that supported the Board's method of analysis and its conclusions.⁴⁷ Justice Brennan, in writing the dissent, agreed with the Board that the appropriate inquiry in determining

³⁶ *Id.* The same rationales underlie the exclusion of managerial employees from coverage under the Act as supervisors. *Id.* at 694-95 (Brennan, J., dissenting opinion). If supervisors represented the rank and file, they might become accountable to the workers, interfering with their ability to advance management interests. *Id.* at 695.

³⁷ *Id.* at 691.

³⁸ *Id.* at 686. Because the Court concluded that faculty members were managerial and thus excluded from the Act's coverage, it did not discuss their supervisory status. *Id.* at 682.

³⁹ *Id.* at 682 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974)).

⁴⁰ *See id.* at 686-87.

⁴¹ *Id.* at 688.

⁴² *Id.*

⁴³ *Id.* at 689.

⁴⁴ *Id.* While the Court acknowledges that there was some tension between the Act's inclusion of professional employees and its exclusion of managerial personnel, *id.* at 686, the Court noted that the Board had not inquired previously as to whether employees' decisions were based on independent professional judgment or upon management policy when determining their managerial status. *Id.* at 687. The Court cautioned that the managerial exclusion could not be used to remove all professionals from the Act's coverage. *Id.* at 690. Instead, the duties of a professional would align him with management only if his activities fell outside of the scope of the duties routinely performed by similarly situated professionals. *Id.*

⁴⁵ *Id.* at 686.

⁴⁶ *Id.* The Court acknowledged that a professor performing governance functions may be held less accountable for departures from institutional policy than a middle-level industrial manager, but the Court found this distinction to be immaterial. *Id.* at 689.

⁴⁷ *Id.* at 692, 694.

managerial status was whether an employee in performing his duties acted primarily upon his own behalf or in the interest of his employer.⁴⁸ If an employee was not expected to conform with management policies and was not judged by his effectiveness in carrying out these policies, then it was unlikely that unionization would lead to divided loyalty, which the Act's managerial exclusion was designed to avoid.⁴⁹ The dissent pointed out that university professors were not expected to represent management interests, since they were judged by the quality of their teaching and scholarship, rather than by their implementation of administrative policy. Therefore, unionization created no conflict of interest.⁵⁰ The dissent also rejected the majority's contention that the interests of the faculty and the administration were indivisible.⁵¹ In the dissent's view, the fact that the faculty and administration shared interests did not mean that their concerns were identical, as evidenced by the faculty's desire for unionization.⁵² The dissent noted that the university administration operated under economic and fiduciary constraints, while the primary concerns of faculty members were academic and related to their own professional reputations.⁵³ Having concluded that the Board analyzed the faculty role at Yeshiva in light of the purposes of the Act's exclusion of supervisory and managerial employees, the dissent stated that the Court should have upheld the Board's decision.⁵⁴

The *Yeshiva* decision can be expected to have a significant impact upon Board characterizations of university faculty members as non-managerial employees. The Court's reasoning marks the demise of the Board's traditional three-part rationale,⁵⁵ which frequently led the Board to conclude that full-time faculty members were not managerial employees.⁵⁶ The Court's comparison of the responsibilities of faculty members with the job duties of employees in industrial settings makes it likely that fewer faculty members will be included in bargaining units certified by the Board.⁵⁷

⁴⁸ *Id.* at 695-96.

⁴⁹ *See id.* at 696.

⁵⁰ *Id.* at 699-700.

⁵¹ *Id.* at 700-01.

⁵² *Id.* at 701-02.

⁵³ *Id.* at 701. The dissent pointed out that the interests of employees and employers never totally diverged, since both sought to maintain a viable operation and to produce a quality product. *Id.* The dissent stated that university decision-making today hardly resembled the majority's idealized notion of collegial decision-making that was a vestige of medieval universities. *Id.* at 702. The Court noted that the trend towards administrative decisions based upon financial concerns increasingly has eroded the faculty's role in the university decision-making process. *Id.* at 703.

⁵⁴ *Id.* at 705-06.

⁵⁵ *See* note 5 and accompanying text *supra*.

⁵⁶ *See, e.g.,* *Northeastern University*, 218 N.L.R.B. 247, 89 L.R.R.M. 1862 (1975); *University of Miami*, 213 N.L.R.B. 634, 87 L.R.R.M. 1634 (1974); *Adelphi University*, 195 N.L.R.B. 639, 79 L.R.R.M. 1545 (1972).

⁵⁷ *See Trustees of Boston University v. NLRB*, 575 F.2d 301, 98 L.R.R.M. 2070 (1st Cir. 1978), *vacated*, 445 U.S. 912 (1980). The First Circuit applied a test that was nearly identical to the Board's assessment in *Yeshiva* in order to determine whether department chairpersons were supervisory or managerial employees. The court examined the relative amount of interest of chairpersons in furthering the policy of the administration as opposed to the interests of

The dissenting opinion in *Yeshiva* represents a different approach toward judicial review of Board decisions than that undertaken by the majority. The dissent took the position that judicial authority was restricted to the review of Board decisions for their rationality and for their consistency with the Act.⁵⁸ In the dissent's view, the Board had considered the nature of governance at Yeshiva in light of the purposes underlying the Act's exclusion of supervisory and managerial personnel, so that the Board's determination that a faculty unit was appropriate should have been upheld by the Court.⁵⁹ The dissent noted that it agreed with the Board's conclusions based upon the facts of this case.⁶⁰ The dissent stated, however, that even if it had made a different determination, it would have upheld the Board's decision because the Board used an appropriate method of analysis and reached a rational result.⁶¹ The majority, like the dissent, asserted that it reviewed the Board's decision for its rationality in evaluating the articulated facts and for its consistency with the Act.⁶² The majority stated, however, that it found neither criterion satisfied.⁶³

While the Board's decision may be criticized, it is incorrect to conclude, as did the majority, that it was irrational. The majority correctly asserted that the interests of the Yeshiva faculty and management were not as separable as the Board represented.⁶⁴ The majority, however, completely ignored the difference between the faculty's and management's primary concerns. The Court's labeling of the Board's opinion as irrational merely enabled the majority to substitute its own judgment as to the proper method of analysis of the faculty's managerial status. The approach of the dissent is more consistent with the Court's statement in an earlier case that it was up to the Board, rather than the judiciary, to adjust national labor policy to the changing patterns of industrial life.⁶⁵ There are no clearcut boundaries between professional employees, who expressly were included within the Act,⁶⁶ and managerial employees, who have been excluded from coverage.⁶⁷ The structure of labor-management relations is not readily transferable from an industrial to a university setting. The dissent correctly reviewed the Board's decision and determined that the Board properly both had examined the purposes behind the Act's supervisory and managerial exclusion and had considered these reasons when it concluded that the Act covered faculty members. The majority, on the other hand, claimed to be using

members of the bargaining unit. 575 F.2d at 305, 98 L.R.R.M. at 2073. The First Circuit agreed with the Board that chairpersons were aligned with faculty members rather than with the administration because department chairpersons consulted with the faculty before making recommendations, and because final decisions were made by the president of the university and the board of trustees rather than by chairpersons. *Id.* at 305-06, 98 L.R.R.M. at 2073-74. The Supreme Court vacated the First Circuit's opinion presumably for the reasons articulated in *Yeshiva*.

⁵⁸ 444 U.S. at 693-94.

⁵⁹ *Id.* at 705-06.

⁶⁰ *Id.* at 706.

⁶¹ *Id.*

⁶² *Id.* at 691.

⁶³ *Id.*

⁶⁴ *Id.* at 688.

⁶⁵ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1974).

⁶⁶ See 444 U.S. at 705 (Brennan, J., dissenting).

⁶⁷ See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

the same standard of review, while it substituted instead its own judgment as to the relationship of the Act to an industrial setting.

The *Yeshiva* decision can be expected to make it much more difficult for faculty members to achieve protected status under the National Labor Relations Act. Because the Supreme Court in effect ignored the differences between authority structures in the typical industrial and academic settings, the traditional professional duties of faculty members will often be classified as managerial. Rather than making a broad determination of the faculty's alignment with management as opposed to representation of its own professional interests, the Court has mandated a factually based assessment of the control and authority actually asserted by faculty members. Only if the desires of the faculty and administration are antagonistic will faculty members be classified as nonmanagerial employees. The attorney representing the faculty union therefore, should attempt to demonstrate that the administration frequently overrules faculty decision-making, and that there are significant areas of university governance in which the faculty exercises no authority. Conversely, the labor lawyer representing the university should therefore seek to show similarities between the faculty's active participation in governance at *Yeshiva* and at the institution which he represents.

II. UNFAIR LABOR PRACTICES

A. *Employer Unfair Labor Practices*

1. *Representation at Investigatory Hearings: Baton Rouge Water Works Co.**

In *NLRB v. J. Weingarten, Inc.*,¹ the United States Supreme Court held that an employee has a statutory right to union representation at an investigatory interview with his employer if the employee requests representation and reasonably believes that the interview may result in disciplinary action being taken against him.² An employer who requires an employee to attend such an interview without union representation, the Court held, violates section 8(a)(1) of the National Labor Relations Act (NLRA)³ by interfering with the individual right of the employee, protected by section 7 of the NLRA,⁴ "to engage in . . . concerted activities for . . . mutual aid or protection . . ."⁵ The Court in *Weingarten* noted that the National Labor Relations Board (Board) had drawn a

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¹ 420 U.S. 251 (1975).

² *Id.* at 268.

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 Section 7, 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 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.

⁵ *Weingarten*, 420 U.S. at 252.

distinction between "investigatory" and "disciplinary" interviews.⁶ At an investigatory interview the employer is trying to investigate and determine the facts of a situation, while at a disciplinary interview the employer is already aware of the facts to his satisfaction and seeks to obtain an admission of the employee's wrongdoing.⁷ Although *Weingarten* recognized the right to union representation at either an investigatory or a disciplinary interview, the decision did not indicate whether a similar right to representation exists if an employer seeks to meet with an employee, not to obtain information or an admission, but simply for the purpose of announcing a predetermined disciplinary decision.

During the *Survey* year, the Board confronted this issue in *Baton Rouge Water Works Co.*,⁸ and resolved a conflict, which had developed subsequent to *Weingarten*, between two Board decisions — *Certified Grocers of California, Ltd.*⁹ and *Amoco Oil Co.*¹⁰ A divided Board in *Baton Rouge* held that an employee has no section 7 right to union representation at a meeting held solely to inform him of a previously made disciplinary decision.¹¹ The Board noted, however, that at any interview, whether deemed "investigatory" or "disciplinary," where the employer seeks to do more than simply announce his disciplinary decision, the employee has a section 7 right to representation.¹²

The question of whether *Weingarten* applied to meetings held solely to announce a predetermined disciplinary decision was first confronted by the Board in *Certified Grocers*. This case involved a plant manager who was dissatisfied with an employee's low productivity and, after an initial warning, called the employee into his office to impose a two week disciplinary layoff.¹³ When the employee came to the manager's office he requested to have his union representative present and to see his production records.¹⁴ Both requests were denied.¹⁵ The manager stated that the company had reviewed the employee's work, that it was still not satisfactory, and that he was, therefore, issuing another warning and a two week layoff.¹⁶ The meeting then terminated. In response to the union's petition on behalf of the employee, the Board held that the manager had violated the employee's section 7 rights by continuing the meeting without allowing the employee's union representative to be present.¹⁷ The Board emphasized that the role of the union representative was both to as-

⁶ *Id.* at 259-60.

⁷ This distinction was first expressed in *Texaco, Inc.*, 168 N.L.R.B. 361, 362, 66 L.R.R.M. 1296, 1297 (1967), *enf't denied*, 408 F.2d 142, 170 L.R.R.M. 3045 (5th Cir. 1969).

⁸ 103 L.R.R.M. 1056 (1979).

⁹ 227 N.L.R.B. 1211, 94 L.R.R.M. 1279 (1977), *enf't denied*, 587 F.2d 449, 100 L.R.R.M. 3029 (9th Cir. 1978).

¹⁰ 99 L.R.R.M. 1250 (1978).

¹¹ 103 L.R.R.M. at 1058.

¹² *Id.*

¹³ *Certified Grocers of California, Ltd.*, 227 N.L.R.B. at 1211-12, 94 L.R.R.M. at 1280.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1212, 94 L.R.R.M. at 1283. The Court of Appeals for the Ninth Circuit refused to enforce the decision of the NLRB. *NLRB v. Certified Grocers of California, Ltd.*, 587 F.2d 449, 451 (9th Cir. 1978). The court emphasized that the employee did not have the right to

sist the employee and to see what bearing the meeting might have on other employees in the unit.¹⁸ Thus, under the holding in *Certified Grocers*, an employee had the right to union representation at any meeting, whether or not an "interview" in the traditional sense of the word, where the employee reasonably believed that discipline might be imposed.

Almost two years later, the Board in *Amoco Oil Co.*¹⁹ substantially reduced the scope of the *Certified Grocers* holding. In *Amoco* an employee had been called into his superintendent's office for the purpose of being given an indefinite suspension notice.²⁰ When the employee insisted upon union representation, the superintendent responded by announcing the disciplinary decision and terminating the meeting.²¹ The Board held that the superintendent had not violated the employee's section 7 rights because he promptly terminated the meeting after the employee had requested union representation.²² There was no mention in the decision of the need to have a union representative present to evaluate the effects of the discipline on the other employees. The Board distinguished *Certified Grocers* by stating that the employer there had continued the planned interview and had commented negatively on the employee's work after the request for representation had been made.²³ Although this distinction is plausible, both situations were in fact quite similar in that both primarily involved announcing a predetermined disciplinary decision. Thus, in spite of the holding in *Amoco* that an employer could announce a disciplinary decision at a meeting without allowing union representation, it was not clear at what point union representation had to be granted.

The Board in *Baton Rouge* cleared up the uncertainty that existed in the wake of *Certified Grocers* and *Amoco* by expressly overruling *Certified Grocers* and holding that an employee does not have a right to union representation at a disciplinary announcement and that a discussion instigated by the employee does not transform a disciplinary announcement into an interview where the *Weingarten* rights apply.²⁴ The complaining employee in *Baton Rouge* worked in the general office department of the respondent company, where she was classified as a "probationary employee," as were all of the respondent's new employees for the first 120 days of employment.²⁵ Near the end of the employee's probationary period, her supervisor reported to the manager of the general office department that the employee was not performing her duties in a satisfactory manner.²⁶ After consultation with an assistant vice-president and additional observation of the employee, the decision was made to discharge her and

union representation because no "discussion or consultation" occurred or was even contemplated. *Id.* at 451. Rather, the meeting was held solely "to deliver the warning notice." *Id.* The court cited *Mt. Vernon Tanker Co. v. NLRB*, 549 F.2d 571 (9th Cir. 1977), and *NLRB v. Columbia Univ.*, 541 F.2d 922 (2d Cir. 1976).

¹⁸ *Certified Grocers of California, Ltd.*, 227 N.L.R.B. at 1213, 94 L.R.R.M. at 1282.

¹⁹ 99 L.R.R.M. 1250 (1978).

²⁰ *Id.* at 1251.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Baton Rouge Water Works Co.*, 103 L.R.R.M. at 1058.

²⁵ *Id.* at 1056.

²⁶ *Id.*

a discharge form was filled out.²⁷ Three days later, the employee was called into her supervisor's office and told that because "things were not working out," she was being discharged.²⁸ The employee responded by arguing that the discharge was unfair and requested the presence of her union representative.²⁹ The superintendent in turn told the employee that she was not entitled to union representation because of her probationary status.³⁰ During this discussion the assistant personnel manager walked into the office and the employee asked him whether she was entitled to union representation.³¹ He confirmed the superintendent's ruling that she had no right to union representation.³² Then, in response to the employee's demand to know why she was being fired, the personnel manager answered that it was a departmental decision and that the company could not use her services.³³ The manager of the general office department then entered the office and discussed with the employee the latter's work performance, offering several specific examples of poor performance in the past.³⁴ Soon after this discussion the meeting ended.

Upon learning of this meeting, the union petitioned the Board, claiming that the employer had violated section 8(a)(1) of the NLRA by refusing the employee's request for union representation and then continuing the meeting without a representative present.³⁵ In a plurality opinion, Members Jenkins and Truesdale for the Board concluded that there had been no violation of section 8(a)(1) and held that "under the Supreme Court's decision in *Weingarten*, an employee has no right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision."³⁶ They found that despite the discussion that ensued after the discharge announcement was made, the meeting was not one where the *Weingarten* rights applied.³⁷ Members Jenkins and Truesdale stressed, however, that they were *not* holding that there is no right to union representation at any disciplinary interview.³⁸ They noted that if an employer were to inform an employee of a disciplinary action, and then seek facts to support the action, attempt to have the employee acknowledge his wrongdoing, or urge the employee to sign a statement, the right to union representation would attach.³⁹ If, however, the employee begins a discussion of the reasons for the disciplinary measures, this fact alone will not convert the meeting into one where the *Weingarten* rights apply.⁴⁰

The Board commented that although *Certified Grocers* had been decided in-

²⁷ *Id.* at 1057.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1058.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

correctly, the decision properly had abandoned the distinction between investigatory and disciplinary interviews.⁴¹ Henceforth, the right to representation would exist at *either* type of interview, except for "those conducted for the exclusive purpose of notifying an employee of a previously determined disciplinary action."⁴² The Board stated that if it were to apply *Weingarten* to meetings held only for the purpose of announcing disciplinary actions, employers would simply forego such meetings and return to using the "'pink slip,' a result which . . . would serve neither the interest of the employee nor any objective of enlightened labor relations policy."⁴³

In a concurring opinion seeking to clarify the Board's position, Member Murphy drew a distinction between "interviews" held to secure information from the employee, where the *Weingarten* rights apply, and disciplinary "actions," where they do not.⁴⁴ In applying this distinction to *Baton Rouge*, she concluded that the meeting at issue was only a disciplinary action because the discussion that developed was caused by the employee's protestations and management's inability to end the confrontation gracefully.⁴⁵ The employer was not seeking information or an admission from the employee.⁴⁶

Chairman Fanning, in a dissenting opinion, agreed with the other members that if an employer simply makes a discharge announcement, no right to union representation arises.⁴⁷ He argued, however, that if an employer proceeds to discuss an employee's work record, the employee then has the right to union representation because the disciplinary action has been transformed into a disciplinary interview.⁴⁸ Chairman Fanning objected that the majority interpreted *Weingarten* too narrowly and ignored the earlier case law that established the right to union representation at disciplinary interviews.⁴⁹ What began as a discharge announcement to the *Baton Rouge* employee became a discussion of the employee's work record; at that point, Chairman Fanning concluded, the *Weingarten* right to union representation properly could have been invoked.⁵⁰

Member Penello also dissented, and although his position was essentially the same as that of Chairman Fanning, he stressed that the right violated by *Baton Rouge Water Works* was fully established prior to *Weingarten*.⁵¹ In offering a detailed history of pre-*Weingarten* case law, Member Penello stated that the Board's initial position was that there is a right to union representation at disciplinary, but not at investigatory interviews.⁵² The Board then *expanded* the

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1059.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1060.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, n.13.

⁵⁰ *Id.*

⁵¹ *Id.* at 1061.

⁵² Member Penello cited, *inter alia*, as examples of the earlier position, *Texaco Inc., Producing Div.*, 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967), *enf't denied*, 408 F.2d 142, 70 L.R.R.M. 3045 (5th Cir. 1969); *Dayton Typographical Services, Inc.*, 176 N.L.R.B. 357, 72

right to union representation, stated Member Penello, to investigatory interviews where the employee reasonably believed that disciplinary action would result from the investigation.⁵³ He noted that this expansion was approved by the Supreme Court in *Weingarten*.⁵⁴ Member Penello stressed that because *Weingarten* was based upon the previously established section 7 right to union representation at any disciplinary interview, the majority's holding was a "legal impossibility" that undercut the very foundation of *Weingarten*.⁵⁵

The *Baton Rouge* decision is significant because it formally abandoned the distinction between disciplinary and investigatory interviews and because it clearly defined when the section 7 right to union representation does and does not exist. Although an employee has the right to union representation at "interviews" with his employer, he does not have such a right if the employer simply announces a disciplinary action. An employee's protestations or request for information will not suffice to transform a disciplinary action into an interview, even if some discussion of the employee's work ensues. This holding thus clears up the uncertainty that existed after the *Certified Grocers* and *Amoco* decisions as to when the right to union representation exists.

Several factors favor the *Baton Rouge* decision. Despite Member Penello's dissatisfaction with the changing course of the Board's decisions in regard to the right to union representation at employer-employee meetings, the development of the law in this area exemplifies what the Supreme Court referred to in *Weingarten* as the "evolutional approach," which it concluded is particularly fitting for administrative agencies.⁵⁶ As the Court noted in *Weingarten*, it is essential that the Board be able to change its position in response to developments in industrial life and unfolding variant situations.⁵⁷ The Board responded in *Baton Rouge* to what it saw as the unsatisfactory distinction between investigatory and disciplinary interviews and to its impression that an employee does not have a substantial need for union representation at meetings held simply to announce a disciplinary action, where the employer does not seek information or an admission from the employee.⁵⁸

Contrary to the assertion of Chairman Fanning that the majority interpreted *Weingarten* so narrowly as "virtually to destroy the concept from which it sprang,"⁵⁹ the protection afforded an employee by *Weingarten* was not seriously

L.R.R.M. 1073 (1969); and *Lafayette Radio Electronics Corp.*, 194 N.L.R.B. 491, 78 L.R.R.M. 1693 (1971).

⁵³ *Baton Rouge Water Works Co.*, 103 L.R.R.M. at 1063. Member Penello found this expansion in *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. International Ladies Garment Workers Union v. Quality Mfg. Co.*, 416 U.S. 968, 88 L.R.R.M. 2698 (1975); *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); and *J. Weingarten, Inc.*, 202 N.L.R.B. 446, 82 L.R.R.M. 1559 (1973), *enf't denied*, 485 F.2d 1135, 84 L.R.R.M. 2823 (7th Cir. 1973), *rev'd*, 420 U.S. 251, 88 L.R.R.M. 2689 (1975).

⁵⁴ *Baton Rouge Water Works Co.*, 103 L.R.R.M. at 1064.

⁵⁵ *Id.* at 1065.

⁵⁶ *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 265.

⁵⁷ *Id.*

⁵⁸ *Baton Rouge Water Works Co.*, 103 L.R.R.M. at 1058-59.

⁵⁹ *Id.* at 1060 n.3.

diminished by *Baton Rouge*. An employer who wishes to *interview* an employee, in the sense that he wishes to obtain some information or an admission from the employee, must still abide by *Weingarten*. As the Court of Appeals for the Ninth Circuit stated in *Alfred M. Lewis, Inc. v. NLRB*,⁶⁰ "it is the presence of an investigatory element which gives rise to the right [to union representation]." ⁶¹ If an employer does seek information or an admission of any kind from the employee, the employee can demand union representation, and the employer must either terminate the interview or allow the representative to be present.⁶² An employee cannot be punished for insisting upon this right.⁶³ *Baton Rouge* simply holds that when an employer seeks only to make a disciplinary announcement, an event that hardly can be described as an interview, the employee has no right to representation.⁶⁴ The employee's recourse at this point, if he feels the discipline imposed is unjust, is the grievance procedure.⁶⁵

What has been taken away from employees and their unions by the *Baton Rouge* decision is the right to have the union observe disciplinary meetings that might have an effect on the other employees in the unit in addition to the employee being disciplined. A union representative would be of little use if no more occurred at a meeting than an announcement, but when an evaluation of the employee's work occurs at a meeting, as it did in *Baton Rouge*, these matters are of great importance to the union and to the individual workers in the unit. The Board in *Baton Rouge*, however, concluded that formal grievance procedures can protect workers' interests, for it stated:

Contrary to the contention of the majority in *Certified Grocers*, such a conversation or discussion [of the employee's work] between the employer and the employee does not require the presence of the union representative to inform the employee of his rights and the support the employee might expect from the union, or to elicit information necessary for the protection of the interests of the other employees in the unit. Once a disciplinary decision has been made by the employer, the proper forum for the discussion and evaluation of that disciplinary action shifts to the grievance procedure.⁶⁶

The formal grievance procedure, however, would not be as capable of revealing the stated and unstated expectations of the employer as would union representation at disciplinary meetings where the representative could observe the informal exchange between the employer and employee. Furthermore, an employee who is being disciplined might not understand fully the evaluation of his work that takes place at the disciplinary meeting. When he resumes work he might be subjected to additional discipline simply because he has not understood completely the employer's evaluation. The presence of a union representative at a disciplinary meeting where the employee's work is discussed could help all the employees better understand why the discipline is being imposed.

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

⁶¹ *Id.* at 411-12, 99 L.R.R.M. at 2846.

⁶² *Baton Rouge Water Works Co.*, 103 L.R.R.M. at 1058.

⁶³ See *Southwestern Bell Tel. Co.*, 227 N.L.R.B. 1223, 94 L.R.R.M. 1305 (1977).

⁶⁴ *Baton Rouge Water Works Co.*, 103 L.R.R.M. at 1058.

⁶⁵ *Id.*, n.3.

⁶⁶ *Id.*

The *Baton Rouge* decision clarified an area of the law that had been left unclear by the Supreme Court's decision in *Weingarten*. By dropping the distinction between disciplinary and investigatory interviews, a distinction that had never been well defined, the Board simplified matters considerably. The distinction that now must be made in each case is between *interviews*, where the employer actively seeks information or an admission from the employee, and disciplinary *announcements*. Although the protection offered an employee by *Weingarten* is not limited dramatically by *Baton Rouge*, the bargaining unit as a whole has lost an important right to have a representative present when an employee initiates a discussion and evaluation of his work at a disciplinary announcement.

2. *Discharge of Supervisors for Union Activism: DRW Corp.**

The National Labor Relations Act (Act or NLRA) denies supervisors protection from discharge or discipline for engaging in union or other concerted employee activities.¹ During the *Survey* year, however, the NLRB, in *DRW Corp.*,² held that the firing of a supervisor for engaging in union activities is an unfair labor practice and constitutes a violation of section 8(a)(1) of the Act³ when the firing is part of a pattern of conduct by the employer intended to inhibit employee exercise of their section 7⁴ rights.⁵ When an employer creates an atmosphere of coercion in which it is impossible for the employees to determine whether the employer is legitimately exercising power to prohibit union activity among supervisors or whether the employer is improperly interfering with the employees' right to engage freely in union activity, the Board ruled that restoration of the *status quo ante* is required to dissipate fully the coercive effect.⁶ Such a restoration requires reinstatement of all individuals affected, including supervisors.⁷

For policy reasons the NLRA specifically excludes supervisors from its protection. The congressional purpose in creating this exclusion was twofold: to ensure that rank-and-file employees can unionize and select their leaders without undue influence from supervisors in the union, and, to ensure that

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¹ See Gorman, LABOR LAW 33-37 (1976).

² *DRW Corp.*, 248 N.L.R.B. No. 95, 103 L.R.R.M. 1506 (1980).

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

⁴ Section 7 of the Act provides:

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

29 U.S.C. § 157 (1976).

⁵ *DRW*, 248 N.L.R.B. No. 95, slip op. at 4, 103 L.R.R.M. at 1508.

⁶ *Id.*, slip op. at 5, 103 L.R.R.M. at 1508.

⁷ *Id.* 103 L.R.R.M. at 1508.

supervisors remain loyal to their employer and do not fall into league with, or become accountable to, the employees that they are charged to supervise.⁸ This policy is effectuated by sections 2(3) and 14(a) of the Act. Section 2(3) expressly excludes supervisors from the definition of employee under the Act.⁹ Section 14(a) provides that no employer covered by the NLRA shall be forced, for the purpose of collective bargaining, to treat as an employee any individual defined by the Act as a supervisor.¹⁰ Thus, although it allows supervisors to become union members,¹¹ the Act does not provide supervisors the same right to organize that it grants to other employees.

The Board implemented this congressional policy in decisions that recognized an employer's prerogative to discharge supervisors for union activism in order to assure their loyalty to management. As long as the action reasonably was adapted to this end, the Board allowed such employer actions.¹² Despite the Act's clear policy of permitting supervisor dismissals for union activity, however, the Board, even before *DRW*, had held that in certain limited circumstances the discharge of a supervisor may violate section 8(a)(1) of the Act. For example, the Board found such a violation when a supervisor was fired for giving testimony adverse to the employer's interest either at NLRB proceedings,¹³ or at a hearing of an employee's grievance under a collective bargaining agreement.¹⁴ Additionally, the Board made similar rulings in cases where supervisors were discharged for reasons, such as, not informing the company about union activity among rank-and-file employees,¹⁵ not complying fully with the employer's instructions to keep the union out of the plant,¹⁶ not cooperating with a company plan to classify supervisors as operators for the purpose of the eligibility list to be used in an NLRB election,¹⁷ or not participating in the discriminatory discharge of an employee.¹⁸ Supervisors were af-

⁸ Gorman, *supra* note 1, at 34.

⁹ 29 U.S.C. § 152(3) (1976).

¹⁰ 29 U.S.C. § 164(a) (1976). The section also states: "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization" *Id.*

¹¹ See note 10 *supra*.

¹² See, e.g., *Stop and Go Foods, Inc.*, 246 N.L.R.B. No. 167, 103 L.R.R.M. 1046 (1974); *L & S Enterprises, Inc.*, 245 N.L.R.B. No. 144 (1979). The Supreme Court has recognized that the Act permits "employers to discharge supervisors without violating the Act's restraints against discharges on account of union membership." *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 654-55 (1974).

¹³ *Better Monkey Grip Company*, 115 N.L.R.B. 794, 38 L.R.R.M. 1025 (1956), *enf'd*, 243 F.2d 836 (5th Cir.), *cert. denied*, 355 U.S. 864 (1957); *Modern Linen and Laundry Service, Inc.*, 116 N.L.R.B. 794, 39 L.R.R.M. 1126 (1956); *Oal-Tex Optical Company, Inc.*, 131 N.L.R.B. 715, 48 L.R.R.M. 1143 (1961), *enf'd*, 310 F.2d 58 (5th Cir. 1962); *Oil City Brass Works*, 147 N.L.R.B. 627, 56 L.R.R.M. 1262, *enf'd*, 357 F.2d 466, 61 L.R.R.M. 2318 (5th Cir. 1966).

¹⁴ *Ebasco Services, Inc.*, 181 N.L.R.B. 768, 73 L.R.R.M. 1518 (1970); *Rohr Industries, Inc.*, 220 N.L.R.B. 1029, 90 L.R.R.M. 1541 (1975).

¹⁵ *Inter-City Advertising Co.*, 89 N.L.R.B. 1103, 26 L.R.R.M. 1065 (1950).

¹⁶ *NLRB v. Talladega Cotton Factory*, 213 F.2d 209, 34 L.R.R.M. 2196 (5th Cir. 1954).

¹⁷ *NLRB v. Vail Mfg. Co.*, 158 F.2d 664, 19 L.R.R.M. 2177 (7th Cir.), *cert. denied*, 332 U.S. 826, 20 L.R.R.M. 2185 (1947).

¹⁸ *General Engineering, Inc.*, 131 N.L.R.B. 648, 48 L.R.R.M. 1105 (1961).

forded protection under the Act in these cases in order to protect employees' section 7¹⁹ rights. The Board, under the above circumstances, concluded that the firing of supervisors interferes with the employees' exercise of their section 7 rights, and that reinstatement is required in order to protect those rights.

The *DRW* case dealt with the reconciliation of the conflict between an employer's right to dismiss a supervisor for union activism or other concerted activity, and the prohibition against supervisor dismissals that violate employees' section 7 rights. *DRW* involved a supervisor, Oatman, and an employee, Houk, who were active in a union organizing campaign. Oatman, with Houk's assistance, had questioned employees about their interest in the union, had arranged for a meeting with union officials at his house, and had passed out union cards and literature.²⁰ Shortly thereafter, the employer, *DRW* Corp., laid off Oatman and Houk, and informed its other employees (1) that Oatman and Houk had been fired because they were union instigators, (2) that the other employees would be discharged if they supported the union, and (3) that the plant would be closed if the employees chose the union to represent them.²¹ The employees were also interrogated about their union activities and given the impression that their union activities were under surveillance.²²

Following the firings of Houk and Oatman, the United Brotherhood of Carpenters and Joiners of America filed a complaint on their behalf with the NLRB, and a hearing was held before an Administrative Law Judge (ALJ).²³ The ALJ concluded that *DRW* Corp. violated section 8(a)(1) of the Act by the discharge of supervisor Oatman, and that section 8(a)(3) was violated by the discriminatory discharge of employee Houk.²⁴ The Board affirmed the rulings, findings and conclusions of law of the ALJ and adopted his recommended order, and it also issued a separate opinion that explained more fully the grounds for the reinstatement of Oatman.²⁵

In its supplementary opinion, the Board acknowledged that the Act does not prevent employers from discharging or disciplining supervisors for engaging in antagonistic union activity.²⁶ The Board went on to state, however, that when an employer engages in a widespread pattern of misconduct against both employees and supervisors, that conduct, taken as a whole, may be sufficient evidence to find that the employer was motivated by a desire to discourage union activities among its employees in general.²⁷ Such employer conduct, according to the Board, is a violation of section 8(a)(1).²⁸ The Board noted that in past cases such a situation has been characterized as a pattern of conduct aimed at coercing employees in the exercise of their section 7 rights.²⁹ According to

¹⁹ See note 4 *supra*.

²⁰ *DRW*, 248 N.L.R.B. No. 95, slip op. at 2, 103 L.R.R.M. at 1508.

²¹ *Id.*, slip op. at 2-3, 103 L.R.R.M. at 1508.

²² *Id.*, slip op. at 3, 103 L.R.R.M. at 1508.

²³ *Id.* at ALJ's opinion p. 2.

²⁴ *Id.*, slip op. at 2, 103 L.R.R.M. at 1507.

²⁵ *Id.*, slip op. at 1, 103 L.R.R.M. at 1507.

²⁶ *Id.*, slip op. at 3, 103 L.R.R.M. at 1508.

²⁷ *Id.*, slip op. at 4, 103 L.R.R.M. at 1508.

²⁸ *Id.*

²⁹ *Id.* See *Fresno Townhouse, Inc.*, 246 N.L.R.B. No. 167, 103 L.R.R.M. 1035 (1979); *Downslope Industries, Inc. and Greenbrier Industries, Inc.*, 246 N.L.R.B. No. 132, 103

the Board, in such an intentionally created atmosphere of coercion, an employer oversteps the bounds of his right to prohibit union activity among supervisors and treads on the employees' right to engage freely in union activity themselves.³⁰ This atmosphere of coercion, the Board reasoned, makes it difficult for employees to determine when the employer is exercising his legitimate right to prohibit participation by supervisors in union activities and when the employer is interfering with the employees' right to engage in union activities.³¹ When these circumstances were found to exist in past cases, the opinion noted that the Board found that restoration of the *status quo ante* was required to fully remedy the coercive effect of the employer's actions and that this restoration must encompass reinstatement of all individuals affected, including supervisors.³²

After expounding upon these general principles, the Board applied them to the facts of *DRW*. It found that Oatman's discharge was part of a pattern of conduct aimed at coercing employees in the exercise of their section 7 rights and, therefore, the firing was held to be a violation of section (8)(a)(1) of the Act.³³ In reaching this conclusion, the Board noted that the employer had threatened and interrogated its employees, and had engaged in other unlawful conduct against them, including the discharge of employee Houk.³⁴ The Board also pointed to the use of the two firings by *DRW* as an example to other employees of what would happen to them if they supported the union.³⁵ These facts, according to the Board, constituted an atmosphere of coercion which required the restoration of the *status quo ante*.

In a dissenting opinion, Member Truesdale stated that he did not believe the discharge of Oatman constituted a section 8(a)(1) violation.³⁶ Truesdale argued that two lines of cases exist that hold that the firing of a supervisor is a section 8(a)(1) violation. He identified the first line of cases as those holding that a violation occurred when a supervisor's discharge clearly and directly interfered with employees' section 7 rights. He stated that he approved of these decisions.³⁷ Truesdale disapproved, however, of the second line of cases, which

L.R.R.M. 1041 (1979); *Fairview Nursing Home*, 202 N.L.R.B. 318, 82 L.R.R.M. 1566 (1973).

³⁰ *DRW*, 248 N.L.R.B. No. 95, slip op. at 4-5, 103 L.R.R.M. at 1508. The Board acknowledged that the mere fact that a supervisor's firing may cause employees to fear that they will incur the same fate if they engage in similar union activities is not sufficient to transform a supervisor dismissal into a section 8(a)(1) violation. *Id.*, slip op. at 3-4, 103 L.R.R.M. at 1508. According to the Board's analysis, the section 8(a)(1) violation occurs when an employer actively attempts to inhibit employees in the exercise of their section 7 rights in conjunction with the dismissal of a supervisor for union involvement. At that point the employer has combined a lawful act with an unlawful act and the Board has felt that when the two acts coincide employees cannot distinguish the lawful act from the unlawful act.

³¹ *Id.* 103 L.R.R.M. at 1508.

³² *Id.*, slip op. at 5, 103 L.R.R.M. at 1508.

³³ *Id.*, slip op. at 5-6, 103 L.R.R.M. at 1508. See notes 3-4 *supra*.

³⁴ 248 N.L.R.B. No. 95, slip op. at 5, 103 L.R.R.M. at 1508.

³⁵ *Id.*, slip op. at 5-6, 103 L.R.R.M. at 1508.

³⁶ *Id.*, slip op. at 9, 103 L.R.R.M. at 1509 (Truesdale, Member, dissenting).

³⁷ *Id.*, slip op. at 12, 103 L.R.R.M. at 1510 (Truesdale, Member, dissenting). An example of this line of cases is *Better Monkey Grip Co.*, 243 F.2d 836, 40 L.R.R.M. 2027 (5th Cir.), *cert. denied*, 355 U.S. 864 (1957), in which the Board held that the discharge of a supervisor

he identified as the "integral part" or "conduit" cases. These cases ruled that the discharge of a supervisor was a section 8(a)(1) violation when it was "an integral part of a pattern of conduct aimed at penalizing employees for their union activities."³⁸

Truesdale pointed to two factors that distinguished the two classes of cases. First, he stated that the former class of cases involved supervisors who only were involved tangentially in union activity, while the supervisors in the latter category actively had sought to organize the rank-and-file employees for the union.³⁹ Second, Truesdale pointed out that the principles that governed the first class of cases had been applied uniformly by the Board, but that the second category of cases seemed to lack any controlling principles. Many cases containing similar factual settings, he noted, have resulted in decisions that are difficult to reconcile.⁴⁰ Thus, Truesdale concluded that "the 'integral part' or 'conduit' line of cases has produced decisions that are confusing and inconsistent, with no clear guidelines articulated regarding when supervisory participation in union or concerted activity is protected."⁴¹

Having concluded that the "conduit" line of cases does not properly deal with supervisory discharges, Truesdale set out what he believed to be the appropriate test for reviewing supervisor discharges. This test would require the reinstatement of a supervisor whenever he has been discharged for acting to protect employees' section 7 rights⁴² or, for refusing to perform an act that would infringe employees' section 7 rights.⁴³ If a supervisor was discharged, either alone or along with rank-and-file employees, because of his participation in union or concerted activity, however, Truesdale's test would uphold the supervisor's discharge because supervisors are excluded from protection under the Act.⁴⁴ Applying this test in *DRW*, Truesdale concluded that Oatman's discharge had not interfered with the rights of employees to exercise their section 7 rights, and that his reinstatement was not necessary to convey to employees the extent to which the Act protects these rights.⁴⁵

for testifying adversely to the employer's interests in a NLRB proceeding violated the Act because the discharge intimidated non-supervisory employees in the exercise of their statutory rights. *Id.* at 837, 40 L.R.R.M. at 2027.

³⁸ 248 N.L.R.B. No. 95, slip op. at 12-13, 103 L.R.R.M. at 1510 (Truesdale, Member, dissenting). See, e.g., *Krebs and King Toyota, Inc.*, 197 N.L.R.B. 462, 463 n.4, 80 L.R.R.M. 1570, 1571 n.4 (1972).

³⁹ 248 N.L.R.B. No. 95, slip op. at 13, 103 L.R.R.M. at 1510 (Truesdale, Member, dissenting).

⁴⁰ *Id.* 103 L.R.R.M. at 1510. Compare *Pioneer Drilling Co., Inc.*, 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enfd in material part*, 391 F.2d 961, 67 L.R.R.M. 2956 (10th Cir. 1968) and *Krebs and King Toyota, Inc.*, 197 N.L.R.B. 462, 80 L.R.R.M. 1570 (1972) with *Karl Kristofferson*, 184 N.L.R.B. 159, 74 L.R.R.M. 1645 (1970), *enfd sub nom. Johnson v. NLRB*, 441 F.2d 266, 76 L.R.R.M. 3056 (4th Cir. 1971) and *Sibilio's Golden Grill, Inc.*, 227 N.L.R.B. 1688, 94 L.R.R.M. 1439 (1977).

⁴¹ 248 N.L.R.B. No. 95, slip op. at 17-18, 103 L.R.R.M. at 1512 (Truesdale, Member, dissenting).

⁴² An example would be the dismissal of a supervisor for giving testimony adverse to his employer's interests at a grievance hearing.

⁴³ 248 N.L.R.B. No. 95, slip op. at 22, 103 L.R.R.M. at 1513 (Truesdale, Member, dissenting).

⁴⁴ *Id.*, slip op. at 22-23, 103 L.R.R.M. at 1513 (Truesdale, Member, dissenting).

⁴⁵ *Id.*, slip op. at 23, 103 L.R.R.M. at 1513 (Truesdale, Member, dissenting). In support of this conclusion, Truesdale pointed out that the threat made by the employer concerning

The majority in *DRW* would require the reinstatement of a discharged supervisor whenever the supervisor's firing has been part of a pattern of conduct by the employer intended to inhibit employees' exercise of their section 7 rights. Reinstatement should be required in this situation, according to the Board, because without it employees will not be able to make the distinction between the employer's lack of power to interfere with their right to organize and participate in union activities and the employer's right to prevent such activity among supervisors.⁴⁶ Thus, before a supervisor is reinstated, the Board must make a subtle differentiation between those firings of union activist supervisors that merely cause employees to fear that the same fate may befall them if they engage in union activity, and those firings that actually create an atmosphere in which employees cannot distinguish their own right to organize from their employer's right to prohibit supervisor union activity.⁴⁷

It is unlikely that the subtle distinction between a supervisor discharge that makes employees fear for their jobs and one that actually makes them incapable of identifying their own rights to unionize can be made consistently and accurately. Because of the difficulty in making this determination accurately, the Board in applying this test will probably conclude that an atmosphere of coercion has been created whenever a supervisor's discharge for union activity coincides with an attempt by the employer to dissuade employees from choosing a union to represent them.⁴⁸ The effect of this rule will be to inhibit employers in the exercise of their right to discharge a supervisor for union activities at precisely the time the right is most valuable to the employer — during an organizing campaign. It is during such a campaign that an employer will be most interested in preventing supervisor participation in union activities so that supervisors will not influence employees in their union representation decision.

Admittedly, employers should not be encouraged to accompany supervisor discharges with efforts to prevent employees from exercising their section 7 rights, but employee organizing activities by an employer should not take away an employer's right to discharge supervisors for union activism. If the employer's efforts to prevent employees from exercising their section 7 rights become so extreme as to amount to a section 8(a)(1) violation, employees may be made aware of their rights by Board ordered corrective action short of reinstatement of supervisors.⁴⁹ Full restoration of the *status quo ante*, except for the

union support by employees could have been cured by the posting of an appropriate notice by the Board. Truesdale also stated that the reinstatement with back pay of unlawfully discharged employees was all that was needed to make other employees aware of the protection accorded by the Act to organize and bargain collectively. *Id.*, slip op. at 22, 103 L.R.R.M. at 1513 (Truesdale, Member, dissenting).

⁴⁶ See text at note 29 *supra*.

⁴⁷ The Fifth Circuit Court of Appeals has described this distinction as a false issue in viewing supervisor discharges. See *Oil City Brass Works v. NLRB*, 357 F.2d 466, 470 (5th Cir. 1966).

⁴⁸ This was the fact situation in *DRW*. Supervisor Oatman and employee Houk were discharged simultaneously for engaging in union activity and the firings coincided with other employer actions which were aimed at discouraging the selection of a union as a bargaining representative by employees. See text at notes 20-22 *supra*.

⁴⁹ Member Truesdale noted in his dissent that reinstatement of the employees and the posting of appropriate notices by the Board were adequate to make employees aware of the extent

rehiring of supervisors, and the posting of notices at the workplace should be sufficient to inform employees of the scope of their section 7 rights.

The test for reviewing supervisor discharges that was set out by Member Truesdale is faithful to the congressional intent of permitting the discharge of union activist supervisors while still prohibiting discharges that are intended to interfere with employee exercise of section 7 rights. His approach should be adopted by the Board. Truesdale properly pointed out that the Act protects employees, not supervisors.⁵⁰ Therefore, he would hold that any discharge of a supervisor for participation in union activity is lawful.⁵¹ Only if a supervisor had not engaged in union activity, but instead had been discharged for giving testimony adverse to his employer's interests, or for refusing to commit unfair labor practices, would he be reinstated under Truesdale's test.⁵² The supervisor would be reinstated because his discharge interfered with employee exercise of section 7 rights, and not because of any protection accorded supervisors by the Act.

Truesdale's test could be accurately and consistently applied, and it would give full effect to Congress' decision to permit employers to prevent supervisor union activism. The threshold inquiry would be whether the supervisor had participated actively in union activities. If he has, then he may be discharged lawfully and his discharge would be upheld. If he has not participated in union activities, the Board then would determine whether the supervisor was discharged for refusing to cooperate with the employer's attempts to interfere with employees' section 7 rights. If the Board found that this was the basis for the discharge, the supervisor would be reinstated. Reinstatement of employees and the posting of notices by the Board could be used if it becomes necessary to educate employees as to the extent of their rights under the Act.

The Truesdale test would clarify and protect the rights and powers granted employees, employers and supervisors under the Act because it can be easily understood and consistently applied. It also implements properly the congressional intent expressed in the Act. These qualities make the test an effective one for prospectively informing all parties of what their rights and powers are under the Act. For these reasons it should be adopted in future cases.

B. *Union Unfair Labor Practices*

1. *Hot Cargo Agreements in the Construction Industry: Pacific Northwest Chapter of the Associated Builders and Contractors v. NLRB**

Section 8(e) of the National Labor Relations Act (Act)¹ prohibits labor-management agreements in which an employer contracts with a union not to

of their section 7 rights. *DRW*, 248 N.L.R.B. No. 95, slip op. at 22, 103 L.R.R.M. at 1513 (Truesdale, Member, dissenting).

⁵⁰ *Id.*, slip op. at 22-23, 103 L.R.R.M. at 1509 (Truesdale, Member, dissenting).

⁵¹ *Id.* 103 L.R.R.M. at 1509 (Truesdale, Member, dissenting).

⁵² *Id.*, slip op. at 22, 103 L.R.R.M. at 1509 (Truesdale, Member, dissenting).

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¹ Section 8(e) provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer

do business with specified persons — so-called hot cargo agreements.² This prohibition has been construed to extend only to agreements embodying secondary, not primary, union objectives.³ Primary union objectives involve protecting the work opportunities of bargaining unit employees, while secondary objectives encompass general union objectives such as organizing the employees of neutral employers.⁴ Thus, union signatory clauses which require that a general contractor only subcontract with firms that are parties to a specific union contract, are unlawful under section 8(e) because they are directed toward the secondary union purpose of organizing the employees of a subcontracting firm.⁵ A proviso in section 8(e), however, exempts secondary agreements from the general prohibition against hot-cargo clauses provided the agreements pertain to subcontracted work that is to be done at a construction site. Since the enactment of section 8(e) in 1959, the National Labor Relations Board (Board or NLRB) consistently has held that union signatory clauses in construction industry agreements are within the scope of this proviso, and hence not prohibited by the Act.⁶

During the *Survey* year, however, the Court of Appeals for the Ninth Circuit in *Pacific Northwest Chapter of the Associated Builders and Contractors v. NLRB*⁷ (*Associated Builders*) took a more limited view of the section 8(e) proviso. Relying on its perception of congressional intention and the recent Supreme Court decision in *Connell Construction Co. v. Plumbers Local 100*,⁸ the Ninth Circuit held that

to enter into any contract or agreement, express or implied, where by such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. Provided, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work.

29 U.S.C. § 158(e) (1976).

² The name, hot cargo, evolved because of the prevalence of these agreements at one time in Teamster Union contracts.

³ See *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 637-38 (1967).

⁴ *Id.* An agreement with a primary union objective is addressed to the labor relations of the contracting employer vis-a-vis his own employees. Thus, collective bargaining agreements designed to preserve work for bargaining unit employees and to assure that negotiated standards are not undermined are primary in nature. Where, however, the object is not to preserve or protect the working standards of employees in a unit, but to control the employment practices of firms which seek to do business with the employer and to assist union members generally, such object is secondary and unlawful. See *Heavy, Highway, Building & Constr. Teamsters Comm. of N. Cal.*, 227 N.L.R.B. 269, 272, 94 L.R.R.M. 1210, 1214 (1976).

⁵ *Colorado Bldg. & Constr. Trades Council*, 239 N.L.R.B. 253, 99 L.R.R.M. 1610 (1978).

⁶ The Board originally held that although union signatory clauses were permitted under the construction industry proviso, picketing to obtain such clauses violated section 8(b)(4)(A). Subsequently, when these holdings were denied enforcement in several courts of appeal, *Orange Belt Dist. Council of Painters No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964), the Board acquiesced and permitted such picketing. See *Northeastern Ind. Bldg. & Constr. Trades Council*, 148 N.L.R.B. 854, 57 L.R.R.M. 1081 (1964).

⁷ 609 F.2d 1341, 103 L.R.R.M. 2144 (9th Cir. 1979), *rehearing en banc granted*, No. 78-3469 (9th Cir. Aug. 19, 1980).

⁸ 421 U.S. 616 (1974).

the construction industry proviso does not exempt all union signatory clauses from unfair labor practices charges.⁹ The court instead held that the proviso only shields signatory clauses that stem from a collective bargaining relationship and that pertain to a construction site where signatory union members may work alongside non-union workers.¹⁰

Two decisions of the National Labor Relations Board were before the Ninth Circuit in *Associated Builders*. The first case¹¹ involved a collective bargaining agreement between the International Union of Operating Engineers (Engineers) and the Oregon-Columbia Chapter of the Associated General Contractors of America (AGC).¹² The agreement contained a provision precluding AGC members from assigning jobsite work to any subcontractor that did not have a current labor agreement with the signatory union, the Engineers.¹³ Another provision required that violations of the agreement be subject to grievance and arbitration procedures as well as such other actions that the parties might find necessary.¹⁴ An association of contractors that was not a party to this agreement filed charges with the NLRB, and the Board's General Counsel issued a complaint alleging that the subcontracting clause violated section 8(c). In the second case,¹⁵ negotiations between the Woelke and Romero Framing Co. (Woelke) and the United Brotherhood of Carpenters and Joiners of America (Carpenters) terminated when Woelke, a general contractor, refused to accept a proposal that would prevent it from subcontracting jobsite work to anyone other than employers that were parties to the current Carpenters agreement.¹⁶ When Woelke was picketed, it filed charges with the General Counsel, who issued a complaint against the Carpenters union.

Upon review, the Board found that although the subcontracting clauses in each case were secondary in effect, they were nevertheless authorized by the construction industry proviso of section 8(c).¹⁷ The Board observed that these provisions were not primary in nature because they were not directed to labor

⁹ 609 F.2d at 1347, 103 L.R.R.M. at 2147.

¹⁰ *Id.* at 1347-48, 103 L.R.R.M. at 2147-48.

¹¹ Operating Engineers Local 701, 239 N.L.R.B. 274, 99 L.R.R.M. 1589 (1978).

¹² The Oregon-Columbia Chapter of the Associated General Contractors is an association of two hundred contractors in the Pacific Northwest.

¹³ The collective bargaining agreement between Engineers and AGC contained this provision:

Article VIII: Subcontractors and Other Employers — Employers shall not contract any work covered by this Agreement to be done at the site of construction, alteration, painting or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

Id. at 275, 99 L.R.R.M. at 1590.

¹⁴ *Id.*, 99 L.R.R.M. at 1590.

¹⁵ Carpenters Local 944 and 235, 239 N.L.R.B. 241, 99 L.R.R.M. 1580 (1978).

¹⁶ The agreement rejected by Woelke included this provision, in relevant part: "The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work . . . except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate party signatory to this Agreement." *Id.* at 243, 99 L.R.R.M. at 1582.

¹⁷ Operating Engineers Local 701, 239 N.L.R.B. 274, 277, 99 L.R.R.M. 1589, 1591 (1978); Carpenters Local 944 and 235, 239 N.L.R.B. 241, 250, 99 L.R.R.M. 1580, 1588 (1978).

relations between the contracting employer and its employees. Instead, the Board found that these clauses were designed to achieve the secondary purpose of organizing non-union subcontracting firms, and were, therefore, within the general prohibition of section 8(c).¹⁸ The Board noted, however, that it consistently had construed the construction industry proviso literally, thereby protecting "any agreement" that limits subcontracting work at a construction jobsite to firms that are signatories of a specific union agreement.¹⁹

Having concluded the clauses were legal under its interpretation of the law, the Board next considered whether its construction of section 8(e) was contrary to the Supreme Court's interpretation of the proviso in *Connell Construction Co. v. Plumbers Local 100*.²⁰ In *Connell* a union had picketed a general contractor, and forced the contractor to sign a subcontractor agreement even though the union did not represent, and did not seek to represent, the contractor's employees.²¹ The contractor challenged the agreement under the Sherman Act, but the union claimed that the agreement was authorized by the construction industry proviso of section 8(e).²² In holding that this agreement could be the basis for an anti-trust action, the Supreme Court ruled that the proviso only permits construction industry subcontracting agreements that result from collective bargaining relationships between unions and general contractors and that it perhaps might only pertain to common situs relationships on particular jobsites.²³ The NLRB noted that *Connell* primarily was concerned with situations where there were no collective bargaining relationships between the union and the general contractor. The Board reasoned, therefore, that the Supreme Court had limited the scope of the proviso only to the extent of requiring that a valid collective bargaining relationship exist between signatories to a subcontracting agreement.²⁴ Since in both cases before it the subcontracting clauses concerned jobsite work and arose out of collective bargaining relationships between unions and general contractors, the Board found that the clauses were protected by the proviso and dismissed the complaints.²⁵

On appeal, the Ninth Circuit rejected the reasoning of the Board. While it agreed with the NLRB's conclusion that these subcontractor clauses were invalid under the general prohibition of section 8(e),²⁶ the court differed with the Board regarding the impact of *Connell* on the scope of the construction industry proviso. The Ninth Circuit observed that *Connell* had emphasized that one

¹⁸ Operating Engineers Local 701, 239 N.L.R.B. at 277, 99 L.R.R.M. at 1591; Carpenters Local 944, 239 N.L.R.B. at 246, 99 L.R.R.M. at 1585.

¹⁹ Operating Engineers Local 701, 239 N.L.R.B. at 277, 99 L.R.R.M. at 1591; Carpenters Local 944, 239 N.L.R.B. at 246, 99 L.R.R.M. at 1585.

²⁰ 421 U.S. 616 (1974).

²¹ 421 U.S. at 623.

²² *Id.*

²³ *Id.* at 633.

²⁴ Operating Engineers Local 701, 239 N.L.R.B. at 277, 99 L.R.R.M. at 1591; Carpenters Local 944, 239 N.L.R.B. at 250, 99 L.R.R.M. at 1588.

²⁵ In Operating Engineers Local 701, 239 N.L.R.B. 274, 99 L.R.R.M. 1589 (1978), the Board found that the grievance and arbitration procedures included in the agreement sanctioned economic action to insure compliance with the subcontractor clause. Since the Board interpreted the proviso to section 8(e) as only enforceable through judicial action, the self help measures were found unlawful. *Id.*

²⁶ 609 F.2d at 1346, 103 L.R.R.M. at 2147.

significant objective of the Labor Management Relations Act (LMRA) of 1959, of which section 8(e) was a part, was to limit top down organizing campaigns by unions.²⁷ Top down organizing occurs when a union forces an employer to recognize the union as its employees' representative without permitting the employees a choice as to their representative. The Ninth Circuit concluded that the subcontracting clause in question permitted precisely this kind of organizing by the unions.²⁸ Therefore the court of appeals held that the union signatory clauses then before it, although the result of collective bargaining, should not be shielded by the proviso.²⁹

In reaching this conclusion, the court rejected the unions' contention that the construction industry proviso was enacted at a time when union signatory clauses were accepted as lawful, and that the proviso merely served to preserve the status quo in the construction industry.³⁰ The court declared that the permissible limits of subcontractor agreements had not been determined conclusively prior to the enactment of section 8(e).³¹ The leading Supreme Court case at the time of the proviso's enactment, *United Brotherhood of Carpenters v. NLRB (Sand Door)*,³² the court observed, did not consider the lawfulness of signatory clauses relating to subcontracting but dealt only with supply contracts.³³ Furthermore, the court found that it was not clear that the proviso was supposed to preserve the then existing law.³⁴ Looking at the legislative history, the court admitted that some statements in the conference report suggested that the proviso did not alter the prevailing law, but the court also observed that other statements in the report suggested that the proviso was intended to outlaw the kind of agreements that the Supreme Court had found lawful in *Sand Door*. Because of this conflicting record, the court reasoned that although Congress may have intended to preserve existing law by enacting the proviso, that intention was too uncertain to be relied on in determining the proper scope of the proviso.³⁵

To determine the intended scope of the proviso the Ninth Circuit instead looked to the general purpose of the proviso in the context of its statutory setting. Citing its own decision in *ACCO Construction Equipment, Inc. v. NLRB*, the court reiterated that the primary purpose of the proviso was to minimize the tension that is likely to occur when union members work alongside non-union workers at a construction site.³⁶ Thus, the court reasoned that union signatory clauses that govern work at all jobsites are unnecessarily broad because if the contractor does not assign any union workers to a particular jobsite no tension should occur.³⁷ The court also observed that union signatory clauses have a

²⁷ 609 F.2d at 1350, 103 L.R.R.M. at 2150.

²⁸ *Id.*, 103 L.R.R.M. at 2150.

²⁹ *Id.* at 1347, 103 L.R.R.M. at 2147.

³⁰ *Id.* at 1348, 103 L.R.R.M. at 2148.

³¹ *Id.* at 1349, 103 L.R.R.M. at 2148.

³² 357 U.S. 93 (1958) (the issue in *Sand Door* was whether union picketing in support of a hot cargo agreement, which forbade the use of non-union materials, was unlawful under section 8(b)(4)).

³³ *Id.* at 1349-50, 103 L.R.R.M. at 2148-49.

³⁴ *Id.*, 103 L.R.R.M. at 2148.

³⁵ *Id.*, 103 L.R.R.M. at 2149.

³⁶ 511 F.2d 848, 851, 88 L.R.R.M. 2536, 2538 (9th Cir. 1975).

³⁷ 609 F.2d at 1350, 103 L.R.R.M. at 2149.

potentially coercive effect on employees' section 7³⁸ right to bargain through representatives of their own choosing.³⁹ Union signatory clauses undermine this right by forcing non-union firms and employees to accept the signatory union's representation in order to obtain subcontracted work from general contractors who sign such agreements.⁴⁰ Thus, such clauses increase the potential for top down organizing, which is precisely what the Act of 1959 sought to prevent. The court concluded that because the effects of the union signatory clauses in question extended beyond the purpose of the proviso and had such a coercive effect on non-union workers, such clauses should not be deemed lawful.⁴¹

The Ninth Circuit's holding in *Associated Builders*, although consistent with its prior interpretation of the construction industry proviso in *ACCO Construction*, is not necessarily required by *Connell*. Moreover, it does not articulate a practical solution to the unique problems of the construction industry. The court conceded that "the teaching of *Connell* . . . is not unambiguous."⁴² In *Connell* the Supreme Court found that the union was interested solely in using economic pressure to force as many subcontractors as possible to recognize it as the representative of their employees.⁴³ The union did not represent, nor seek to represent the general contractor's employees. Thus, the subcontracting provision clearly was designed to organize subcontractors. The unions' objectives were in no way related to the policies the Supreme Court suggested were behind the enactment of the proviso.⁴⁴ These policies included: (1) permitting some secondary activities at construction sites because of the close community of interests there, and (2) avoiding jobsite tensions.⁴⁵ In the two disputes before the Ninth Circuit in *Associated Builders*, the union signatory clauses seem entirely consistent with these policies. Additionally, the clauses only covered work at construction sites, and thus were designed so that union employees would not have to work with non-union workers. The unions were, therefore, not dealing with just "any employer" as in *Connell*, and they were not seeking simply to expand union membership. The unions sought these agreements in part for the purpose of protecting employees of the existing bargaining unit. Thus, the presence of a collective bargaining relationship between the union and general contractors, which was a significant concern of the Supreme Court in *Connell*, suggests that the subcontractor clauses in *Associated Builders* were within the proviso.

Furthermore, the purpose that the Ninth Circuit found to be served by the proviso, minimizing jobsite tensions, may be too narrow because it addresses only some of the problems unique to the construction industry. As the Supreme

³⁸ 29 U.S.C. § 157 (1976).

³⁹ 609 F.2d at 1350, 103 L.R.R.M. at 2149.

⁴⁰ The court noted that section 8(f) permits "prehire" labor agreements in the construction industry, but asserted that section 8(f) does not override the workers' rights of self-determination. *Id.*, 103 L.R.R.M. at 2149-50 (citing *Connell*, 421 U.S. at 632).

⁴¹ 609 F.2d at 1350, 103 L.R.R.M. at 2149.

⁴² *Id.* at 1348, 103 L.R.R.M. at 2148.

⁴³ 421 U.S. 616, 631 (1974).

⁴⁴ *Id.* at 630.

⁴⁵ *Id.*

Court observed in *Connell*, because of the close community of interests at construction sites, the proviso may be directed toward achieving other policy goals. For example, craft unionists traditionally have refused to work alongside non-union men at the same construction project.⁴⁶ Such refusals are not generally the product of jobsite tension, but are the result of union organizing policy. As a result of such policies, the construction industry has been particularly vulnerable to sporadic work stoppages.⁴⁷ Congress, in enacting the proviso, was probably concerned about the detrimental effects of such stoppages — decreased productivity in the construction industry and continual labor-management strife. To combat this problem, the proviso was designed to exempt subcontractor clauses pertaining to construction sites from the general section 8(e) ban on agreements with secondary purposes.⁴⁸ Thus, Congress, in enacting the proviso, apparently was willing to permit greater secondary activity at construction sites in return for some stability in the industry.

It is doubtful that the Ninth Circuit's decision in *Associated Builders* will promote this policy of stability within the construction industry. The only form of subcontractor provision left open by the court of appeals is impractical, and may result in further instability in the construction industry. *Associated Builders* only permits collectively bargained subcontractor clauses that preclude signatory union members from working alongside non-union workers.⁴⁹ Such agreements would give general contractors complete control over assigning jobsite work to union or non-union subcontractors. In order to employ non-union subcontractors at a construction project, a general contractor could simply not assign union workers to that site. Under such an arrangement unions run the risk of actually losing work to non-union labor. Therefore, unions would not agree to such a provision. Without subcontractor agreements governing contracts between union and non-union workers at construction sites, intermittent work stoppages and labor-management strife in the construction industry will certainly increase.

Additionally, the test devised by the Ninth Circuit for measuring the legality of signatory clauses will be difficult to apply. The court suggested that the test be construed so that once a union member is present at a jobsite all relevant work, work of a specific craft, must be done by union subcontractors.⁵⁰ It is conceivable, however, that employers might conform to this test in ways that will meet the limited purpose of minimizing non-union jobsite contracts but will heighten overall tension in the construction industry. For instance, a general contractor could assign union subcontractors to perform certain tasks either at the beginning or end of a project, and use non-union workers the rest of the time. In addition, if a jobsite is not defined clearly because it extends over a large geographic area, a general contractor could assign union workers

⁴⁶ *Essex County & Vicinity Dist. Council of Carpenters & Millwrights v. NLRB*, 332 F.2d 636, 640, 56 L.R.R.M. 2091, 2094 (3d Cir. 1964).

⁴⁷ *Id.*

⁴⁸ *See, e.g., Orange Belt Dist. Council v. Maloney*, 98 L.R.R.M. 3193, 3194 (D.C. Cal. 1978) (signatory contractor cannot nullify the proviso simply by not assigning its union employees to a jobsite at which non-union subcontractors are employed).

⁴⁹ 609 F.2d at 1347, 103 L.R.R.M. at 2147.

⁵⁰ *Id.* at 1348, 103 L.R.R.M. at 2148.

to sections of the jobsite where they will have no contact with non-union workers.⁵¹ Since union workers would not be working "alongside" non-union workers in these two examples technically there would not be a problem with jobsite tensions as defined in *Associated Builders*. Thus, a general contractor could claim that it was acting in a manner consistent with the purpose of the proviso. This kind of manipulation of workers, however, only could lead to greater union dissatisfaction and heightened tensions in the construction industry.

Union signatory clauses have been enforced since the enactment of section 8(e) and the accompanying construction industry proviso in 1959,⁵² and the use of such clauses undoubtedly has had a coercive effect on non-union subcontractors in the construction industry. Nevertheless, this is not a compelling reason to restrict the coverage of the construction industry proviso. Some secondary activity in the construction industry, if confined to work done at construction sites, should be permitted in return for industry stability. Until Congress determines that this policy ought to be changed, it should not be tampered with by the courts.

2. *Secondary Boycotts: Pet, Incorporated**

Unfair labor practices, as defined in the National Labor Relations Act (NLRA), include union activity designed to force other persons "to cease doing business with any other person. . . ."¹ Such activity, a type of secondary

⁵¹ See, e.g., *Bullard Contracting Corp. v. Local 91*, 100 L.R.R.M. 2959, 2963 (W.D.N.Y. 1979) (where jobsite may be spread over a considerable geographic area it does not matter that no union employees are found at the jobsite; the subcontracting clause still is covered by the proviso).

⁵² *Construction Prod. & Maintenance Laborers' Local 383 v. NLRB*, 323 F.2d 422, 54 L.R.R.M. 2246 (9th Cir. 1963); *Orange Belt Dist. Council of Painters v. NLRB*, 328 F.2d 534, 55 L.R.R.M. 2293 (D.C. Cir. 1964); *Essex County & Vicinity Dist. Council of Carpenters v. NLRB*, 332 F.2d 636, 56 L.R.R.M. 2091 (3d Cir. 1964).

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¹ The Act provides, in part:

8(b) It shall be an unfair labor practice for a labor organization . . .

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

(B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . .

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

29 U.S.C. § 158 (1976).

boycott, is prohibited in order to protect secondary parties who are not involved in the dispute between the union and the primary employer.² The prohibition, however, contains an exception that allows the union to make the general public aware of its dispute with the primary employer, and toward this end, the union may identify by truthful publicity products distributed by a secondary employer that are in fact produced by the primary employer.³ The only statutory restrictions on the publicity are that the unions may not engage in picketing,⁴ and that the publicity cannot have the effect of inducing other persons to withhold their services as employees to secondary employers.⁵ Permissible results of union publicity, therefore, have been a boycott of the primary employer's goods sold by a secondary employer⁶ and a consumer boycott of the secondary employer's business.⁷ The unfair labor practices prohibitions otherwise would forbid such economic pressure on the primary employer. Because the publicity provision protects the union's activity only if the "product or products are produced by an employer with whom the labor organization has a primary dispute,"⁸ controversy has settled upon the meaning of the word "produced."

Decisions by courts and the National Labor Relations Board (Board) have construed liberally the term produced. For example, in *Lohman Sales Co.*,⁹ a local chapter of the Teamsters Union went on strike against Lohman, a wholesale distributor of tobacco products. As an outgrowth of the strike, the union approached drugstore owners who retailed the cigarettes and other items distributed by Lohman to induce the owners to stop purchasing those items.¹⁰ In addition, the union circulated handbills to consumers to encourage them not to buy items distributed by Lohman.¹¹ The Board held that the publicity proviso protected the union's activity.¹² It ruled that the wholesale distributor was a producer of the items it distributed.¹³ The Board noted that production is not only manufacturing, but includes any application of labor and capital to the

² *Carpet, Linoleum, Soft Tile Layers Local 419 v. NLRB*, 467 F.2d 392, 397 (D.C. Cir. 1972).

³ 29 U.S.C. § 158(b)(4) (1976), reprinted in part at note 1 *supra*.

⁴ *Id.*, cf. *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (peaceful picketing limited to reaching only potential consumers of primary employer's goods rather than secondary employer's entire business); *NLRB v. Retail Clerks Local 1001*, 100 S. Ct. 2372 (1980) (union's picketing may not ruin the secondary employer).

⁵ 29 U.S.C. § 158(b)(4) (1976), reprinted in part at note 1 *supra*.

⁶ See *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964).

⁷ Local 662, *Radio & Television Engineers (Middle South Broadcasting Co.)*, 133 N.L.R.B. 1698, 1705, 49 L.R.R.M. 1042, 1046 (1961). Cf. *NLRB v. Retail Clerks Local 1001*, 100 S. Ct. 2372 (1980) (if picketing is involved, picketing may not ruin the secondary employer); *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (if picketing is involved, union's boycott of secondary employer is restricted).

⁸ 29 U.S.C. § 158(b)(4) (1976), reprinted in part at note 1 *supra*.

⁹ *Teamsters Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901, 48 L.R.R.M. 1429 (1961).

¹⁰ *Id.* at 902, 48 L.R.R.M. at 1430.

¹¹ *Id.*

¹² *Id.* at 906, 48 L.R.R.M. at 1432.

¹³ *Id.* at 907, 48 L.R.R.M. at 1432.

product.¹⁴ The labor provided by Lohman in distributing the cigarettes and other sundries made it a producer of those items.

The Supreme Court expressly approved the Board's *Lohman* decision when it decided *NLRB v. Servette, Inc.*¹⁵ In *Servette*, the Court resolved a conflict between the Board and the Ninth Circuit Court of Appeals over the scope of the definition of producer.¹⁶ The Court favored the Board's broader interpretation.¹⁷ In *Servette*, the union was conducting a strike against a wholesale distributor of food products. The union wanted supermarket chainstore managers not to sell goods supplied by Servette, the primary employer.¹⁸ The Court ruled that the publicity provision applied to the situation, and, therefore, the union activity was protected.¹⁹ In construing the labor statute, the Court noted that the term "producer" must be given a broad definition, or it becomes mere surplusage.²⁰ After reviewing statements made by Senators while the publicity provision legislation was in Congress, the Court described the publicity proviso as the legislature's mechanism for safeguarding a union's freedom to appeal to the public for support.²¹ Limiting the proviso to manufacturers or processors, the Court concluded, would defeat the purpose of Congress in enacting the legislation.²²

Following the *Servette* decision, the Court of Appeals for the Ninth Circuit further expanded the definition of producer. In *Great Western Broadcasting Corp. v. NLRB*,²³ the union had engaged in a strike against the Great Western Broadcasting Corporation, owner of television station KXTV. To increase the pressure on Great Western, the union attempted to force neutral companies to cease advertising on KXTV by subjecting these companies to a secondary boycott.²⁴ The court ruled that KXTV is a producer of the products it advertises.²⁵ Therefore, the publicity provision protected the union when it sponsored a boycott of those products.²⁶

During the *Survey* year, the NLRB again expanded the concept of production. In *Pet, Incorporated*²⁷ the Board held that a subsidiary that is the target of a

¹⁴ *Id.* at 906-07, 48 L.R.R.M. at 1432.

¹⁵ 377 U.S. 46, 55 (1964).

¹⁶ The conflicting definitions were found in *Lohman Sales Co.*, 132 N.L.R.B. 901, 48 L.R.R.M. 1429 (1961), discussed in text at notes 9-14 *supra* and *Great Western Broadcasting Corp. v. NLRB*, 310 F.2d 591 (9th Cir. 1962), discussed in note 26 *infra*.

¹⁷ 377 U.S. at 55.

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 54-57.

²⁰ *Id.* at 56.

²¹ *Id.* at 55.

²² *Id.* at 55, 57.

²³ 356 F.2d 434 (9th Cir. 1966).

²⁴ 310 F.2d 591, 593-94 (9th Cir. 1962) (earlier decision in same case).

²⁵ 356 F.2d at 436.

²⁶ *Id.* This decision reversed an earlier decision in the same case. Prior to the *Servette* decision, the court of appeals had held that an advertiser is not a producer of the products it advertises and that, for purposes of the publicity proviso, television advertising is not a product. 310 F.2d at 595, 598.

²⁷ *United Steelworkers of America (Pet, Inc.)*, 244 N.L.R.B. No. 6, 102 L.R.R.M. 1046 (1979).

strike is a producer of all the products of the parent corporation and the parent's other subsidiaries.²⁸ Therefore, the publicity proviso is broad enough to cover a union prompted consumer boycott of any item produced by the parent or its subsidiaries under the broad *Servette* definition. Although the parent and the co-subsidiaries are not the primary employer, their products are, by the Board's reasoning, also products of the primary employer and susceptible to union pressure.

The *Pet, Incorporated* case involved a strike by the Steelworkers Union against the Bridgeton, Missouri plant of Hussmann, Inc., a subsidiary of Pet, Incorporated.²⁹ Five months into the strike, Hussmann permanently replaced the strikers with other employees.³⁰ In response,³¹ the union announced on television a nation-wide consumer boycott of all Pet products and retail stores.³² Although the boycott was labelled "nation-wide" by the union, it was centered around St. Louis, the site of Pet's corporate headquarters.³³ The union purchased advertising space in local newspapers and passed out handbills in the St. Louis area.³⁴ The advertisements and handbills named specific Pet stores and products.³⁵ The union was careful to comply with the strictures of the NLRA; there was neither picketing nor interference with any secondary employer-employee relationships.³⁶ Nevertheless, Pet promptly filed an unfair labor practice charge with the Board.³⁷ Pet contended that the publicity proviso was inapplicable because the union's publicity was not truthful to the extent that it implied that Hussmann was a producer of the goods of Pet and the other subsidiaries.³⁸

The Board held that the boycott was protected by the publicity provision. The Board recognized that underlying Pet's contention of untruthfulness was a more fundamental question — whether Hussmann was a producer of the goods and services of its parent and co-subsidiaries.³⁹

In answering that basic question, the Board detailed the intricate working relationship between Pet and its subsidiaries. Pet, Incorporated is highly diversified, and has twenty-seven operating divisions. Most of these divisions are allocated among four "Groups," the principal subdivisions of Pet, Incorporated. Hussmann, for example, a manufacturer of commercial refrigeration

²⁸ 102 L.R.R.M. at 1050.

²⁹ *Id.* at 1048.

³⁰ *Solien v. United Steelworkers of America*, 593 F.2d 82, 83 (8th Cir. 1979), *cert. denied*, 100 S. Ct. 54 (1979) (connected case arising from same strike).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 85.

³⁴ 102 L.R.R.M. at 1048.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 593 F.2d at 85. In addition, the Board's regional director sought an injunction against the union for the period during which the Board was considering the charge. *Solien v. United Steelworkers of America*, 449 F. Supp. 580 (E.D. Mo. 1978) (connected case arising from same strike). Although the district court held for the union and denied the injunction request, 449 F. Supp. at 583, it was reversed on appeal. 593 F.2d 82, 87-88 (8th Cir. 1979), *cert. denied*, 100 S. Ct. 54 (1979). Six months later, the Board reached its decision.

³⁸ 102 L.R.R.M. at 1049.

³⁹ *Id.*

and related equipment, is a part of the Commercial Division of the Hussmann Group.⁴⁰ The corporate structure of Pet is such that the president of a division such as Hussmann answers to a senior executive officer within the Pet chain, rather than to a board of directors. Control over day-to-day operations, including labor relations, rests with the division president. Pet's headquarters determines long-range planning and sets general policies that guide division operations. In addition, Pet provides centralized purchasing so that the divisions can take advantage of volume discounts. Pet also provides some legal services to the divisions.⁴¹

In addition to reviewing the general services listed above, the Board examined Hussmann's specific ties with Pet. Pet had provided Hussmann with funding for capital improvements and operating expenses. This "loan" was unsecured, carried no interest, lacked a repayment schedule, and was not evidenced by a note.⁴² The ongoing receipts and disbursements of Hussmann, and the other divisions, were credited first to its own accounts and then to a Pet general bank account. From the inception of the general bank account until the strike, Hussmann's disbursements had exceeded its receipts by a significant amount, resulting in a negative cash flow.⁴³ Pet charged no interest on the outstanding deficit.⁴⁴ The Board also cited Pet's own reports and brochures, both of which highlighted Hussmann's contribution to Pet. The Board described Hussmann as "clearly a major part" of Pet.⁴⁵

Following this review of the relationship between Pet and Hussmann, the Board undertook to determine whether the companies' ties made Hussmann the producer of all Pet products within the meaning of the publicity proviso. Turning to the liberal definitions of producer in past decisions, the Board found Hussmann to be within the Supreme Court's interpretation in *Servette*.⁴⁶ The Board also cited *Lohman Sales Co.* and *Great Western Broadcasting Corp.*, and relied on its definition in the latter case, that a producer is one who "enhances the economic value of the product ultimately sold"⁴⁷ Since Hussmann supplied its labor, in the form of "capital, enterprise, or service" to Pet and its subsidiaries, the Board concluded that Hussmann was a producer of Pet's products.⁴⁸ The union boycott of the primary employer's products, therefore, was properly aimed also at all the products of the Pet conglomerate.⁴⁹

The significance of *Pet, Incorporated* lies in the foothold that it gives unions to apply pressure on management through other members of the corporate family. The case broadens the scope of permissible boycotts in that the connec-

⁴⁰ *Id.* at 1046-47, 1050.

⁴¹ *Id.* at 1047.

⁴² *Id.*

⁴³ *Id.* at 1047-48 & n.13.

⁴⁴ *Id.* at 1048.

⁴⁵ *Id.* at 1050.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1049-50.

⁴⁸ *Id.* at 1050.

⁴⁹ *Id.* at 1051. Having determined that the publicity proviso was applicable, the Board did not decide whether the union activity fell within the scope of the activities prohibited by the Act, *id.* at 1049 n.23, nor did it reach the first amendment aspects of abridging a union's free speech. *Id.* at 1051 n.33.

tion between the primary employer and the boycotted products, supposedly produced by the primary employer, is tenuous. In prior decisions, the primary employer had directly affected the boycotted products by distributing or advertising them. On that basis, the courts or the Board found the primary employer to be a producer of the boycotted merchandise. The holding in *Pet, Incorporated* departs from the earlier decisions because it makes the employer a producer of the goods even though it does not directly handle or market them.

Nevertheless, on both substantive and policy grounds, the Board's decision in *Pet, Incorporated* seems to be a reasonable extension of prior law. If an advertiser can be a producer of another employer's goods, then it follows that a subsidiary, whose goodwill enhances the entire corporate family, is a producer of that family's goods. Even though a subsidiary does not directly handle or market the goods of co-subsidiaries, its successful operation as a going concern supplies capital to the corporate family for direct or indirect use in furthering the family's other enterprises.⁵⁰ Of course, the argument for extending the scope of permissible boycotts to co-subsidiaries is weakened when the subsidiary, such as Hussmann, does more taking than giving. Even in such a case, however, the production concept is still viable because the ultimate goal of the parent's cash advances to the subsidiary is to make the subsidiary a contributing family member.

The *Pet, Incorporated* holding furthers the legislative policy underlying the publicity provision. The publicity proviso enables a union to take its case to the public.⁵¹ When the primary employer's business is intangible or otherwise not easily susceptible to a boycott, the proviso creates the only opportunity for an appeal to the public. The advertising and distribution cases, discussed above, demonstrate that the courts recognize a congressional intent to create such an opportunity. Had the Board reached a contrary decision in *Pet, Incorporated*, the union, and others similarly situated, would have been denied completely the opportunity to appeal to the public because Hussmann manufactured commercial shelving and refrigeration equipment,⁵² items the general public rarely purchases. On the other hand, the items made by *Pet* are familiar to consumers and found in many households.⁵³ These products, therefore, are readily subject to a consumer boycott.

In addition to furthering the policy at the base of the publicity provisions, the extension of the scope of a secondary boycott in *Pet, Incorporated* also promotes the national policy of encouraging the peaceful resolution of labor disputes.⁵⁴ As noted above, subsidiaries contribute capital to the corporate family. In highly diversified conglomerates these contributions create a reservoir upon which the primary employer can draw for support in withstanding the effect of potentially harmful events, such as downturns in the economy, demands by unions, and, if necessary, work stoppages, whether strikes or lock-

⁵⁰ See Los Angeles Newspaper Guild Local 69 (*Hearst Corp.*), 185 N.L.R.B. 303, 304, 75 L.R.R.M. 1014, 1016 (1970), *enfd.*, 443 F.2d 1173 (9th Cir. 1971) (subsidiaries retain "a comfortable cash balance" as "operating profits" and remit the surplus to the parent).

⁵¹ See text at note 21 *supra*.

⁵² 102 L.R.R.M. at 1046.

⁵³ For example, *Pet, Inc.* manufactures a line of dairy products and Whitman's Chocolates; the boycott literature listed seventeen brand-name food products. *Id.* at 1048.

⁵⁴ See 29 U.S.C. §§ 141(b) & 151 (1976) (declarations of policy).

outs. The extension in *Pet, Incorporated* restores the balance between the parties by allowing the union to compensate for a conglomerate employer's advantage by boycotting the merchandise of co-subidiaries, thereby, reducing the cushioning effect the unfettered operation of the co-subidiaries would have. Since both parties are now on notice regarding their equalized positions, they have an incentive to resolve their disputes peacefully and not to engage in wasteful work stoppages to test the staying power of their adversary.

Although the *Pet, Incorporated* decision is sound on policy and substantive legal grounds, the Board's in-depth review of the relationship between Hussmann and Pet is an indication that the holding might be limited to similar fact situations in the future. The Board found a relationship of close interdependence between Pet and Hussmann. In a somewhat different context, however, the Board, in *Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*,⁵⁵ reviewed the intra-corporate workings of Hearst and found that the subsidiaries had autonomy in finances, day-to-day operations, and purchasing and editorial policies.⁵⁶ The Board there held that separate corporate subsidiaries can be persons distinct from the parent and co-subidiaries and that in fact the Los Angeles and San Francisco Divisions of the Hearst Corporation were separate persons.⁵⁷ The *Hearst Corp.* decision indicates that, had the facts of *Pet, Incorporated* been different, the Board might have found that Hussmann was not a producer of Pet's products and services because close interdependence was lacking. In the future the outcome before the Board may depend on how persuasively counsel for each side can marshal facts depicting the particular parent-subidiary or subidiary-subidiary relationship as either autonomous or interdependent.

It remains to be seen whether the broad holding in *Pet, Incorporated* will be limited to similar fact patterns. Future cases may be decided on an *ad hoc* basis with the decision hinging on the nature of the intra-corporate relationship. For the time being, though, a union seems to be able to reach all the products of a diversified organization. The increased leverage available to unions as a result of *Pet, Incorporated* may become a significant bargaining factor. This increased leverage is consistent with the policy underlying the publicity proviso and enables unions to counter the reservoir of resources available to the managers of diversified corporate conglomerates. In the long run the decision should encourage peaceful resolutions of labor disputes.

⁵⁵ 185 N.L.R.B. 303, 75 L.R.R.M. 1014 (1970), *enf'd*, 443 F.2d 1173 (9th Cir. 1971).

⁵⁶ *Id.* at 304, 75 L.R.R.M. at 1016.

⁵⁷ *Id.* at 304, 75 L.R.R.M. at 1015-16. The *Hearst Corp.* decision dealt with the definition of "person" in section 8(b)(4)(B) of the Act. 29 U.S.C. § 158(b)(4)(B), is reprinted in part at note 1 *supra*. The secondary boycott problem arises only if there is another person involved in the union-primary employer dispute. If the Board determines that "neither the subsidiaries nor the parent exercises actual or active, as opposed to merely potential, control over the day-to-day operations or labor relations of the other," then the co-subidiaries are separate persons, "each entitled to . . . protection . . . from the labor disputes of the other." 185 N.L.R.B. at 304, 75 L.R.R.M. at 1015.

In *Pet, Inc.* the Board declined invitations from both parties to base its holding on a restructuring of the definition of "person." 102 L.R.R.M. at 1048-49. Applying the test quoted above, though, it probably would have held that Hussmann and Pet were the same person. In such an event, the outcome would have been the same because there would have been no secondary boycott in the first place.

3. *Access to Union Bulletin Boards: Teamsters Local 515**

Section 7 of the National Labor Relations Act (NLRA)¹ ensures the right of employees to participate in union activity and the corresponding right to refrain from such activity.² These rights are protected by section 8, which specifies those actions that constitute unfair labor practices by employers and unions.³ Among other things, section 8(a)⁴ has been construed as prohibiting employers from restricting employee access to employer-owned bulletin boards that previously had been open to unrestricted employee use.⁵ Since the wording of section 8(a), which applies to employers, differs slightly, however, from that of section 8(b),⁶ which applies to unions, it was unclear whether the same standard applied to union restrictions on the use of union bulletin boards.

During the *Survey* year, the National Labor Relations Board for the first time addressed the issue of access to union bulletin boards in *Teamsters Local 515*.⁷ It held that, in certain circumstances, a union may lawfully remove dissident members' materials from a union-controlled bulletin board.⁸ In *Teamsters Local 515*, the complainant, an employee of Roadway Express, belonged to both the union and a dissident faction, the Professional Drivers Council (PROD). PROD had published a newsletter that was highly critical of the union.⁹ The employee posted the newsletter on a union bulletin board located in the employees' breakroom even though the employer-union collective bargaining agreement stipulated that the board, although owned by the employer, was to be used only for "official union business."¹⁰ Despite the contract stipulation, the union, for at least ten years, had permitted workers to put all types of notices on the bulletin board.¹¹ When the PROD newsletter was posted, however, the union's job steward removed it on orders from the union's business agent.¹² When questioned by the dissident member, the business agent

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¹ 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979).

² *Id.* § 157 (1976). Section 7 provides, in part: "Employees all have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" *Id.*

³ *Id.* § 158.

⁴ *Id.* § 158(a). Section 8(a) provides, in relevant part: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7 of the NLRA]" *Id.*

⁵ See *NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 374 F.2d 147, 152-53, 64 L.R.R.M. 2481, 2483-84 (6th Cir. 1967); *Container Corp. of America*, 244 N.L.R.B. No. 53 (Aug. 17, 1979), 102 L.R.R.M. 1162; *Green Giant Co.*, 223 N.L.R.B. 377, 379, 91 L.R.R.M. 1468, 1471 (1976).

⁶ 29 U.S.C. § 158(b) (1976). Section 8(b) provides, in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [section 7 of the NLRA]" *Id.* See note 4 *supra*.

⁷ 248 N.L.R.B. No. 20 (Mar. 3, 1980), 103 L.R.R.M. 1318 (2-1 decision).

⁸ 248 N.L.R.B. No. 20, 103 L.R.R.M. at 1318.

⁹ *Id.*

¹⁰ *Id.* There were two other employer-owned bulletin boards in the breakroom: one for use by the employer, and one "all-purpose" board for use by anyone. *Id.*

¹¹ *Id.*

¹² *Id.*

replied that, as a union official, " 'he had the legal right to add and delete from that board, whenever he saw fit.' " ¹³

Subsequently, a similar incident occurred and, as a result, the employee filed an unfair labor practice charge against the union under section 8(b)(1)(A). Initially, the employee received a favorable ruling from an NLRB administrative law judge (ALJ). ¹⁴ The ALJ viewed the union's use of the "official business only" rule as analogous to situations where employers selectively applied an otherwise valid no-solicitation rule for the purpose of restricting union solicitations only. ¹⁵ Such action by employers had been held to be in violation of the NLRA. ¹⁶ Applying the reasoning of the no-solicitation cases to the immediate facts, the ALJ concluded that, because the union had allowed employees to place all kinds of notices on the union bulletin board, it could not now limit that usage by prohibiting the posting of materials critical of the union. ¹⁷

The NLRB, however, rejected the reasoning of the administrative law judge and dismissed the complaint. The Board noted that the case was brought under section 8(b)(1)(A) of the NLRA and that the wording of that section differed from the wording of section 8(a)(1), the statutory basis for the cases relied on by the ALJ. ¹⁸ Both provisions describe unfair labor practices, but section 8(a)(1) is directed at employers who "interfere with, restrain, or coerce" employees in the exercise of their section 7 rights. Section 8(b)(1)(A), on the other hand, is directed at labor organizations that "restrain or coerce" employees in the exercise of those same rights. Thus, the NLRA prohibits only restraint or coercion — but not interference — by a union. Focusing on this statutory distinction, the Board found that the union's actions were "completely devoid of any implications of retribution," and that, therefore, the union had neither restrained nor coerced, even if it had interfered with, the dissident member in the exercise of his section 7 rights. ¹⁹

In dismissing the complaint, the Board found it significant that the union did not discipline the employee, or even threaten to do so, for posting the newsletter. ²⁰ The Board also found merit in the union's argument that the dissident group's literature was distributed freely in the breakroom, ²¹ and that the employee was free to post the PROD material on the all-purpose bulletin board which was located in the same area as the union bulletin board. ²² Thus, the action of the union did not seriously impair the employee's section 7 rights.

Unconvinced by the distinction the Board majority drew between complaints brought under section 8(b)(1)(A) and those brought under section

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See, e.g.,* *Lance, Inc.*, 241 N.L.R.B. No. 97 (Apr. 2, 1979), 100 L.R.R.M. 1560, 1561.

¹⁷ 248 N.L.R.B. No. 20, 103 L.R.R.M. at 1318.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*, 103 L.R.R.M. at 1318 n.3.

8(a)(1), Member Jenkins dissented.²³ He viewed the case as involving the same underlying concept that was addressed by the Supreme Court in *NLRB v. Magnavox Co.*²⁴ That concept, he noted, requires that there be "even-handed dissemination of employee views concerning unions, whether for or against"²⁵ *Magnavox* involved a collective bargaining agreement under which the employer issued a rule prohibiting employees from distributing literature on the employer's property.²⁶ The Supreme Court held that employees' section 7 rights cannot be waived by the union, and that availability of bulletin boards for posting of union notices was not a fair substitute for the employees' right to distribute literature pursuant to their section 7 rights.²⁷ Although *Magnavox* was decided under section 8(a)(1), the dissent argued that it nevertheless should be controlling. In applying *Magnavox* to a union, Member Jenkins concluded that a union can neither waive nor preclude the right of an employee, under section 7, to disseminate materials that support or criticize the union.²⁸

The dissenting opinion also disagreed with the majority's view that section 7 rights must be balanced against the union's asserted right to remove unfavorable material from its bulletin board.²⁹ Member Jenkins stated that the union's action suppressed the employee's freedom of expression regarding matters protected by section 7 and, therefore, constituted a restraint on, or coercion of, the employee's rights.³⁰ The absence of any threat of reprisal did not lessen the violation of section 8(b)(1)(A), the dissent added, but the presence of such a threat would constitute an additional violation of the NLRA.³¹

Because the Board's decision in *Teamsters Local 515* ultimately turns on the distinction between section 8(a)(1) and section 8(b)(1)(A), an analysis of that distinction is warranted. Section 8(a)(1) clearly lists employer interference with employee rights as an unfair labor practice.³² Section 8(b)(1)(A), however, does not similarly prohibit union interference with employee rights. Instead it limits its prohibition to union restraint or coercion.³³ The removal of dissident materials from a previously unrestricted bulletin board certainly constitutes an

²³ *Id.*, 103 L.R.R.M. at 1319 (Jenkins, M., dissenting).

²⁴ 415 U.S. 322 (1974).

²⁵ 248 N.L.R.B. No. 20, 103 L.R.R.M. at 1319 (Jenkins, M., dissenting).

²⁶ 415 U.S. at 323.

²⁷ *Id.* at 325-26.

²⁸ 248 N.L.R.B. No. 20, 103 L.R.R.M. at 1319 (Jenkins, M., dissenting).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* In upholding the union's action, the majority of the Board disagreed with the dissenting member's reliance on the Supreme Court's decision in *Magnavox*, 415 U.S. 322 (1974). 248 N.L.R.B. No. 20, 103 L.R.R.M. at 1318 n.2. The majority distinguished *Magnavox*, noting that it dealt with the employer restrictions of section 8(b)(1)(A). It further noted that the issue before the Supreme Court in *Magnavox* was whether a union could waive certain section 7 rights of its members by agreeing to an employer rule which prohibited employees from distributing literature on the employer's property. That issue, the Board asserted, was absent from the instant case, in which the union contracted the right to use a bulletin board on the employer's premises for official union purposes and did not attempt to waive any employee rights in the process. 248 N.L.R.B. No. 20, 103 L.R.R.M. at 1318 n.2.

³² See the text of § 8(a)(1) at note 4 *supra*.

³³ See the text of § 8(b)(1)(A) at note 6 *supra*.

interference with an employee's section 7 rights. The framework of section 8, however, dictates that interference with section 7 rights constitutes an unfair labor practice only when it is committed by an employer.³⁴ A union apparently is free to interfere with its members in the exercise of their section 7 rights, so long as it does not restrain or coerce them. Thus, the language difference between section 8(a)(1) and section 8(b)(1)(A) is crucial to the Board's holding.

The distinction between mere interference and outright restraint or coercion, however, may be difficult to define. The majority in *Teamsters Local 515* implicitly acknowledged that, if the respondent had been an employer, rather than a union, the Board would have upheld the employee's unfair labor practice charge under section 8(a)(1). Indeed, on various occasions the Board has found section 8(a)(1) violations where the employer changed its bulletin board policy before, during, or after a union organization campaign or representation election.³⁵ In *Liberty Nursing Homes, Inc.*,³⁶ for example, the employer changed its bulletin board policy five weeks before a representation election, to prohibit "unauthorized notices."³⁷ In *Vincent's Steak House, Inc.*,³⁸ the employer implemented a rule which prohibited the posting of union-related material during the course of concerted activities.³⁹ In *Beyerl Chevrolet, Inc.*,⁴⁰ following a union organizational campaign, the employer issued an employee manual which included rules restricting employee use of bulletin boards.⁴¹ These cases are distinguishable from *Teamsters Local 515*, however, because the latter case did not involve an organizational or representation election.

The Board also ruled against employers who remove pro-union material and threatened to discipline those employees who posted such material.⁴² In *Container Corp. of America*,⁴³ the employer removed union newsletters from bulletin boards and threatened an employee with disciplinary action for any reposting of newsletters.⁴⁴ In *Green Giant Co.*,⁴⁵ the employer removed pro-union literature from a bulletin board, reprimanded the employee who had posted it, and admonished him not to post anything without prior permission.⁴⁶ Both cases are distinguishable from *Teamsters Local 515* because the union in *Teamsters* did not threaten or discipline the dissident member.

Although the above cases are each distinguishable from *Teamsters Local 515*, the Board was faced with a case parallel to the instant one in *Challenge Cook*

³⁴ Compare § 8(a)(1) with § 8(b)(1)(A). See notes 4 & 6 *supra*.

³⁵ See *Liberty Nursing Homes, Inc.*, 236 N.L.R.B. 456, 99 L.R.R.M. 1435 (1978); *Vincent's Steak House, Inc.*, 216 N.L.R.B. 647, 89 L.R.R.M. 1210 (1975); *Beyerl Chevrolet, Inc.*, 199 N.L.R.B. 120, 82 L.R.R.M. 1075 (1972).

³⁶ 236 N.L.R.B. 456, 99 L.R.R.M. 1435 (1978).

³⁷ *Id.* at 461.

³⁸ 216 N.L.R.B. 647, 89 L.R.R.M. 1210 (1975).

³⁹ *Id.* at 647, 89 L.R.R.M. at 1212.

⁴⁰ 199 N.L.R.B. 120, 82 L.R.R.M. 1075 (1972).

⁴¹ *Id.* at 127.

⁴² See *Container Corp. of America*, 244 N.L.R.B. No. 53 (Aug. 17, 1979), 102 L.R.R.M. 1162; *Green Giant Co.*, 223 N.L.R.B. 377, 91 L.R.R.M. 1468 (1976).

⁴³ 244 N.L.R.B. No. 53 (Aug. 17, 1979), 102 L.R.R.M. 1162.

⁴⁴ *Id.*, 102 L.R.R.M. at 1162.

⁴⁵ 223 N.L.R.B. 377, 91 L.R.R.M. 1468 (1976).

⁴⁶ *Id.* at 379, 91 L.R.R.M. at 1471.

*Brothers of Ohio, Inc.*⁴⁷ There the employer had permitted employees to post notices of all kinds on the company bulletin board, except that, on four separate occasions, it removed notices of union meetings, claiming no one had sought or received permission to post such notices. Although the employer made no threats against the employees or the union, the Board adopted the trial examiner's finding — based on an argument by the General Counsel — that “ ‘the . . . act of singling out the union notices for removal’ constitutes interference with the employees’ organizational rights in violation of Section 8(a)(1).”⁴⁸ The Board’s order was enforced by the United States Court of Appeals for the Sixth Circuit, which held that there was substantial evidence “to support a finding that the removal of the signs was motivated by hostility toward union activity rather than failure to get permission.”⁴⁹ Although the Sixth Circuit decision lends support to the complainant in *Teamsters Local 515*, its precedential value is blunted in that it involved section 8(a)(1) rather than section 8(b)(1)(A).

The section 8(a)(1) cases discussed above are consistent with the statutory directive that any interference, restraint, or coercion by an employer constitutes a violation of the NLRA. They also are instructive, however, in determining the dividing line between lawful interference and unlawful restraint or coercion by a union. A disparately-applied bulletin board policy apparently is viewed by the Board as mere interference. Interference does not become restraint or coercion until there is either discipline or the threat of discipline. The Board noted in *Teamsters* that it “[did] not agree that the [union’s] actions . . . , completely devoid of any implications of retribution, restrained or coerced [the employee] in the exercise of his Section 7 rights.”⁵⁰ It further noted that the union “did not discipline or threaten [the employee] because of his actions.”⁵¹ Thus, the use or threat of discipline seems to be the dividing line between permissible and impermissible union activity.

In interpreting section 8 of the NLRA, the Board was probably correct in distinguishing section 8(a) from section 8(b). Faced with discrete examples of union disciplinary activity, however, it will likely be difficult to draw that distinction rationally.

III. INTERNATIONAL UNION’S DUTY TO END WILDCAT STRIKES:

*Carbon Fuel Co. v. United Mine Workers**

Provisions within collective-bargaining agreements requiring the arbitration of grievances have been held to create an implied contract not to strike.¹ Strikes in violation of this implied duty make the local unions liable in damages

⁴⁷ 153 N.L.R.B. 92, 59 L.R.R.M. 1445 (1965), *enf’d*, 374 F.2d 147, 64 L.R.R.M. 2481 (6th Cir. 1967).

⁴⁸ 153 N.L.R.B. at 99.

⁴⁹ 374 F.2d at 153, 64 L.R.R.M. at 2484.

⁵⁰ 248 N.L.R.B. No. 20, 103 L.R.R.M. at 1318.

⁵¹ *Id.*

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¹ Local 174, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1972).

to the employer.² In recent years, a dispute has developed over the imposition of liability on international unions for such strikes.³ Specifically, the dispute concerns whether an international union is liable for damages to an employer for failure to use all reasonable means to prevent and end unauthorized strikes that violate collective-bargaining agreements.⁴ In responding to this question, a conflict has developed among the various courts of appeals. The Third Circuit Court of Appeals has imposed a duty upon the international union to use its best efforts to end unauthorized strikes.⁵ In contrast, the Fourth,⁶ Sixth,⁷ and Seventh⁸ Circuits have rejected such an implied duty.

During the *Survey* year the Supreme Court resolved the conflict in *Carbon Fuel Co. v. United Mine Workers*.⁹ In *Carbon Fuel*, the Court held that there is no obligation on an international union, "which agreed to arbitrate grievances, to use reasonable means to try to control the locals' actions in contravention of that agreement."¹⁰ The Court also held that in light of the bargaining history of the Bituminous Coal Wage Agreement ("agreement"), the "integrity clause"¹¹ in the agreement was *not* meant to impose on the Union an obligation to get unauthorized strikers back to work.¹²

The holdings of the Supreme Court in *Carbon Fuel* are significant for several reasons. First, the Court resolved the conflict between the circuits concerning an international union's implied-in-law obligation to use all reasonable means to prevent or end a wildcat strike. This holding has ramifications far beyond the mining industry and will be reflected in future contract provisions which attempt to assign this duty to the international unions. *Carbon Fuel* is also significant in the coal mining industry for its elimination of one possible interpretation of the integrity clause in the United Mine Worker's (UMWA) Bituminous Coal Wage Agreement.¹³ Finally, *Carbon Fuel* is important because it emphasizes the necessity of examining the specific terms and bargaining

² *Id.* Injunctive relief has also been allowed when a duty not to strike, whether express or implied from a mandatory arbitration clause, has been violated. *Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).

³ See text and notes at notes 6-9 *infra*.

⁴ *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 213 (1979).

⁵ *Eazor Express, Inc. v. Teamsters*, 520 F.2d 951, 89 L.R.R.M. 3177 (3d Cir. 1975). *Accord*, *Bituminous Coal Operators' Ass'n v. UMWA*, 585 F.2d 586, 99 L.R.R.M. 2612 (3d Cir. 1978); *Republic Steel Corp. v. UMWA*, 570 F.2d 467, 97 L.R.R.M. 2836 (3d Cir. 1978); *United States Steel v. UMWA*, 534 F.2d 1063, 91 L.R.R.M. 3031, *rehearing denied en banc*, 534 F.2d 1084, 92 L.R.R.M. 2575 (3d Cir. 1976).

⁶ *Carbon Fuel Co. v. UMWA*, 582 F.2d 1346, 99 L.R.R.M. 2520 (4th Cir. 1978); *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872, 36 L.R.R.M. 2315 (4th Cir. 1955).

⁷ *Southern Ohio Coal Co. v. UMWA*, 551 F.2d 695, 94 L.R.R.M. 2609 (6th Cir. 1977).

⁸ *Old Ben Coal Corp. v. UMWA*, 457 F.2d 162, 79 L.R.R.M. 2845 (7th Cir. 1972).

⁹ 444 U.S. 212 (1979).

¹⁰ *Id.* at 218.

¹¹ The integrity clause, discussed in detail in the text at notes 47-56 *infra*, provides that the United Mine Workers will maintain the integrity of the agreement which calls for the peaceful settlement of all disputes and claims. *Id.* at 220-21.

¹² *Id.* at 221.

¹³ *Id.* The significance is lessened, however, because the Court expressly refrained from deciding what that clause does mean. *Id.* at n.9.

history of each contract in order to ascertain the parent union's responsibility for violations of the collective-bargaining contract by union locals.

An understanding of the significance of *Carbon Fuel* requires a review of the facts of that case. During the period between 1969 and 1973, three mine worker's union locals engaged in forty-eight wildcat strikes in the Carbon Fuel Company's mines in West Virginia.¹⁴ Carbon Fuel Co. alleged that these strikes were in violation of the National Bituminous Coal Wage Agreements of 1968 and 1971 to which both Carbon Fuel Co. and the UMWA were parties.¹⁵ During the period of the Agreement, District 17, a regional subdivision of UMWA, unsuccessfully attempted to persuade the miners not to strike and to return to work.¹⁶ Seeking injunctive relief¹⁷ and damages from the strikes, Carbon Fuel Co. brought a suit in the District Court for the Southern District of West Virginia.¹⁸ The claim was based on section 310 of the Taft-Hartley Act,¹⁹ and named as defendants the UMWA, District 17, and the three local unions.²⁰ The trial judge held that the strikes violated the agreements as a matter of law.²¹ The judge then instructed the jury that the UMWA and District 17 might be liable if it could be proved that they had not used "all of the reasonable means available to them" to prevent or stop the strikes in violation of the contracts.²² The jury returned verdicts aggregating \$206,547.80 against the international union, \$242,130.80 against District 17, and \$722,347.43 against the three local unions.²³

On appeal,²⁴ the Court of Appeals for the Fourth Circuit vacated in part and affirmed in part the judgment against the three local unions, and vacated the judgments against the international union and District 17.²⁵ With respect to the local unions, the court of appeals found that seventeen of the forty-eight strikes were sympathy strikes and therefore, in the absence of a no-strike clause, were not actionable.²⁶ The Court found that the other thirty-one strikes were properly characterized as wildcat strikes and the locals were liable on the

¹⁴ *Id.* at 213.

¹⁵ *Id.* at 214.

¹⁶ *Id.* at 213-14.

¹⁷ *Id.* at 214. The contract had expired so that the injunctive relief request was moot by the time the controversy reached the Supreme Court. *Id.* at n.2.

¹⁸ *Id.*

¹⁹ 29 U.S.C. § 185 (1976). Section 301 has been interpreted by the Supreme Court as making collective-bargaining agreements judicially enforceable as contracts in the federal district courts. *See, e.g.,* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

²⁰ *Carbon Fuel*, 444 U.S. at 214.

²¹ *Id.*

²² *Id.*

²³ *Carbon Fuel Co. v. UMWA*, 582 F.2d 1346, 1348, 99 L.R.R.M. 2520, 2520 (4th Cir. 1978).

²⁴ *Id.*

²⁵ *Id.* at 1351, 99 L.R.R.M. at 2523.

²⁶ *Id.* at 1348, 99 L.R.R.M. at 2521. *Carbon Fuel* came to trial before the Supreme Court decided *Buffalo Forge v. Steel Workers*, 428 U.S. 397 (1976). The Court in *Buffalo Forge* held that in the absence of an express no-strike clause, a sympathy strike is not actionable. In light of this development, Carbon Fuel Co. conceded that the seventeen sympathy strikes should not have been submitted to the jury. *Carbon Fuel Co. v. UMWA*, 582 F.2d 1346, 1348, 99 L.R.R.M. 2520, 2521 (4th Cir. 1978).

basis of the "mass action" theory of responsibility.²⁷ The UMWA and District 17 were not found liable under the mass action theory because ordinarily its application is limited to the local union unless some complicity is shown on the part of the larger union entity.²⁸ In this regard, the court found that there was no evidence that the UMWA or District 17 instigated, supported, or ratified the strike.²⁹

In vacating the judgments against the UMWA and District 17, the Court of Appeals for the Fourth Circuit felt compelled to follow its decision in *United Construction Workers v. Haislip Baking Co.*³⁰ The court in *Haislip* had held that an international union has no responsibility for a strike which it neither sanctioned nor authorized.³¹ According to the *Haislip* court, the correct standard for determining liability is not whether the non-local union did everything it could to end the strike but whether it adopted, encouraged, or prolonged the continuance of the strike.³² Applying this standard, the court of appeals in *Carbon Fuel* held that because there was no evidence that the international union and District 17 adopted, encouraged, or prolonged the strike, and because nothing in the contract imposes liability for wildcat strikes, the judgments against them should be vacated.³³

A unanimous Supreme Court affirmed the judgment of the court of appeals.³⁴ To Mr. Justice Brennan, writing for the Court, the question was

[W]hether an international union, which neither instigates, supports, ratifies, or encourages "wildcat" strikes engaged in by local unions in violation of a collective-bargaining agreement, may be held liable in damages to an affected employer if the union did not use all reasonable means available to it to prevent the strikes or bring about their termination.³⁵

In holding that neither the UMWA nor District 17 was liable in damages under the circumstances of this case, the Court rejected the employer's contentions that liability could be implied in law because (1) the agreement contains an arbitration provision for settling disputes, or (2) the agreement contains a provision that the parties agree to maintain the integrity of the contract.³⁶

The Court examined in great detail each of the employee's contentions. First the Court examined Carbon Fuel Co.'s argument that the obligations not to strike, implied in the agreement to resolve all disputes by arbitration, implies

²⁷ *Id.* at 1349, 99 L.R.R.M. at 2521. The "mass action" theory confers liability based on the premise that "large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members." *Id.*, 99 L.R.R.M. at 2521-22.

²⁸ *Id.*, 99 L.R.R.M. at 2522.

²⁹ *Id.* at 1351, 99 L.R.R.M. at 2523.

³⁰ 223 F.2d 872, 36 L.R.R.M. 2315 (4th Cir. 1955).

³¹ *Id.* at 877, 36 L.R.R.M. at 2318.

³² *Id.* at 877-78, 36 L.R.R.M. at 2318.

³³ *Carbon Fuel Co. v. UMWA*, 582 F.2d 1346, 1351, 99 L.R.R.M. 2520, 2523 (4th Cir. 1978).

³⁴ *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 215 (1979).

³⁵ *Id.* at 213.

³⁶ *Id.* at 216.

an additional obligation on the international union and District 17 to use all reasonable means to control the local's actions in derogation of that agreement.³⁷ In rejecting this theory, the Court reasoned that while section 301³⁸ of the Act makes collective-bargaining agreements judicially enforceable, the legislative history of the Act shows that Congress "stopped short of imposing liability upon a union for strikes not authorized, participated in, or ratified by it."³⁹ Instead, Congress provided in section 301(e)⁴⁰ that unions would be governed by the common law agency test.⁴¹ The Court determined that Carbon Fuel Co. failed to prove that an agency relationship existed between the international or district union and the strikers.⁴² In support of this determination, the Court stated that the record did not indicate that these unions instigated or supported the strikes.⁴³ Moreover, the Court observed that there was evidence that the UMWA repeatedly expressed its opposition to the wildcat strikes.⁴⁴ Based on these findings, and the clear congressional statement expressed in section 301, the Court concluded that an agreement to arbitrate grievances does not impose upon the international union an obligation to use reasonable means to control the actions of a local union which violates the agreement.⁴⁵

After ruling on the effect of the arbitration agreement, the Court focused on the employer's second argument that if the obligation to use all reasonable means to end an unauthorized strike cannot be implied from the promise to arbitrate disputes, the obligation should be implied from the international union's promise to "maintain the integrity" of the contract.⁴⁶ The employer contended that this promise, intended to resolve disputes by arbitration, has no meaning if the UMWA and District 17 are not obligated to exercise their best efforts to force the miners to live up to the contracts.⁴⁷ The Court rejected this argument.⁴⁸ Stating that one of Congress' most important policies in the Taft-Hartley Act was to promote free collective-bargaining, the Court maintained that if the parties' agreement specifically resolves a particular issue, the Court will not substitute a different resolution.⁴⁹ From this perspective, the Court looked at the bargaining history of the "integrity clause" and found that it did not permit acceptance of the employer's argument.⁵⁰ The bargaining history, which includes a specific deletion of an employer's obligation to end disputes, shows that whatever the clause may mean, "the parties purposely decided not

³⁷ *Id.* at 216-18.

³⁸ 29 U.S.C. § 185 (1976).

³⁹ *Carbon Fuel*, 444 U.S. at 216.

⁴⁰ 29 U.S.C. § 185(e) (1976).

⁴¹ *Carbon Fuel*, 444 U.S. at 216-17. Agency is by definition a consensual relationship.

⁴² *Id.* at 218.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 217-18.

⁴⁶ *Id.* at 218.

⁴⁷ *Id.* at 219.

⁴⁸ *Id.* at 218-22.

⁴⁹ *Id.* at 219.

⁵⁰ *Id.* at 219-21.

to impose on the union an obligation to take disciplinary or other actions to get unauthorized strikers back to work."⁵¹

In addition, the Court observed that since the insertion of the disputed integrity clause, but before 1968 or 1971 when the arguments at issue were reached, two courts of appeals had interpreted the provision in a manner which did not impose liability on the Union for wildcat strikes and did not require the UMWA to take any action with regard to such strikes.⁵² The Court stated that if the parties did not agree with this interpretation they had "ample opportunity to make their own understanding explicit."⁵³ According to the Court, failure to do so indicated that they had incorporated the courts' interpretation.⁵⁴ Thus the Supreme Court affirmed the judgment of the court of appeals.⁵⁵

The Supreme Court's holding in *Carbon Fuel* was based on the clear expression of congressional intent in section 301, which limited the union's responsibility to situations where a common law agency relationship could be shown.⁵⁶ Absent proof of agency, any duty on the part of the union to use all reasonable means to end a wildcat strike would have to originate in the parties' agreement. The record at bar clearly showed lack of an agency relationship or contractual obligation and therefore necessitated that the Court refuse to impose a duty upon the union.⁵⁷ Consequently, the Court's decision, based on both statutory interpretation and factual analysis, was correct.

The practical results of *Carbon Fuel* exist at two levels. At the single-industry level, the Court's rejection of one possible interpretation of the "integrity clause" in the Bituminous Coal Wage Agreement affects only the mining industry. This holding, however, also has ramifications on the multi-industry level. *Carbon Fuel* can be read as requiring employers and international unions in all industries to include provisions in their collective-bargaining agreements if they intend the international union to assume liability for wildcat strikes.

In reaching its holding, the *Carbon Fuel* Court dealt only with the issues

⁵¹ *Id.* at 221. Reviewing the bargaining history of the agreement, the Court noted that when the parties first contracted, in 1941, the agreement contained an explicit no-strike clause. The Court observed that this provision was deleted in 1947 because of the UMWA's desire to avoid liability for contractual breaches under § 301. Instead, the liability was limited to employees "able and willing to work" and the parties agreed that all disputes would be settled through arbitration or collective-bargaining. In 1950 the contract was again rewritten and the "able and willing" provision was replaced by a promise to "maintain the integrity" of the contract and "to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout." *Id.* at 219-21 (emphasis in original). In 1952 the union negotiated the removal of the "best efforts through available disciplinary measures" clause. The provisions of the 1952 contract, dealing with this issue, were carried forward unchanged to the 1968 and 1971 contracts. *Id.*

⁵² *Id.* at 222. See *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 43 L.R.R.M. 2237 (6th Cir. 1958), *aff'd*, 361 U.S. 459 (1960); *United Constr. Workers v. Haislip Baking Co.*, 223 F.2d 872, 36 L.R.R.M. 2315 (4th Cir. 1955).

⁵³ *Carbon Fuel*, 444 U.S. at 222.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 216-18.

⁵⁷ *Id.* at 218-21.

before it and properly refrained from commenting upon the appropriateness of imposing a duty upon the international union to use reasonable means to end or prevent unauthorized strikes. Under the current law such a duty does not exist. The concept, however, is worthy of legislative attention. While this chapter favors a legislative enactment of a reasonable means duty, arguments both for and against its imposition will be discussed.⁵⁸

Two criticisms of the "all reasonable means" duty are that it deprives the international union of flexibility and that the "reasonable means" actually available to the union are limited. The imposition of an "all reasonable means" duty would lessen flexibility by forcing the international unions to take sanctions against the wildcat strikers when non-involvement might be more conducive to a quick settlement. This is especially true when the wildcat strike is a result of the workers' frustration with or lack of confidence in the international union.⁵⁹ A second criticism is that a statutory obligation to use all reasonable means to end wildcat strikes would be limited by the notice and hearing requirements of the Landrum-Griffin Act.⁶⁰ This act requires that before being disciplined a member must receive written charges, be given a reasonable time to prepare his defense, and be afforded a full and fair hearing.⁶¹ Similar disciplinary restrictions are often found in union constitutions and by-laws.⁶² Thus, it is argued that a reasonable means obligation to end wildcat strikes would be neither justifiable nor effective.

The arguments against this view and in favor of adopting a reasonable means obligation are more concerned with ending wildcat strikes than with participating in strict statutory interpretation. The mining industry illustrates the crippling effect that wildcat strikes can have.⁶³ When the whole nation is potentially affected by a wildcat strike in the coal mining industry, contractual provisions between the parties and damage remedies may not prove a satisfactory safeguard. Often one wildcat strike may cause many sympathy strikes.⁶⁴ In light of our current shortage of energy resources our nation can ill afford a coal industry plagued with shut downs. The fact that these strikes affect the whole nation and not just the contracting parties makes damages an insignificant deterrent. The imposition on the international unions of a duty to use all reasonable means to end wildcat strikes does not appear to be too heavy a burden in relation to what is at stake. Such a duty would further our national labor policy of eliminating obstructions to the free flow of commerce by en-

⁵⁸ For a discussion of the arguments against imposition of the duty, see generally Note, *Unions Have Duty to Use All Reasonable Means to End Unauthorized Strikes*, 89 HARV. L. REV. 601, 607-08 (1976) [hereinafter cited as Harvard Note].

⁵⁹ Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672, 702 (1967).

⁶⁰ 29 U.S.C. § 411(a)(5) (1976).

⁶¹ *Id.*

⁶² Harvard Note, *supra* note 58, at 609.

⁶³ The extent of these strikes is shown by the Bituminous Coal Operators' Association's allegation that in the first half of 1975, wildcat strikes in their mines resulted in a loss of 1,368,000 men-days and of 116,500,000 tons of coal. *Bituminous Coal Operators' Ass'n v. UMW*, 585 F.2d 586, 590, 99 L.R.R.M. 2612, 2615 (3d Cir. 1978).

⁶⁴ See *Republic Steel Corp. v. UMW*, 570 F.2d 467, 97 L.R.R.M. 2836 (3d Cir. 1978).

couraging friendly adjustment of industrial disputes through collective bargaining.⁶⁵

Accepting that it was the intent of Congress in enacting the National Labor Relations Act⁶⁶ to encourage collective bargaining as a means of settling labor disputes,⁶⁷ it appears that the international unions are in the best position to effectuate this intent with respect to wildcat strikes. The international unions are the connecting factors and perhaps the only organizations capable of preventing an industry-wide shut down.⁶⁸ They communicate with both employers and employees⁶⁹ and they have the ability to discipline their members. While *Carbon Fuel* correctly expressed existing law, it may be time for the Congress to impose upon international unions the responsibility to police their own locals and prevent their willful repudiation of contractual obligations, their defiance of internal union law, and their disregard of our nation's labor policy.⁷⁰

IV. OSHA — EMPLOYEES' RIGHT NOT TO PERFORM DANGEROUS TASKS: *Whirlpool Corp. v. Marshall**

Section 11(c)(1) of the Occupational Safety and Health Act of 1970¹ (Act) prohibits an employer from discharging or discriminating against an employee because of the employee's exercise of any right afforded by the Act.² In 1973 the Secretary of Labor (Secretary) promulgated a regulation that provides that one of the rights protected by the Act is the right of an employee to refuse to perform an assigned task because of a reasonable apprehension of death or serious injury.³ Under the regulation, the employee must have no reasonable

⁶⁵ 29 U.S.C. § 151 (1976). This section provides in relevant part: "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 . . . by encouraging the practice and procedure of collective bargaining. . . ." *Id.*

⁶⁶ 29 U.S.C. §§ 141-188 (1976).

⁶⁷ *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 882 (S.D.N.Y. 1975).

⁶⁸ *Republic Steel Corp. v. UMWA*, 570 F.2d 467, 479, 97 L.R.R.M. 2836, 2844 (3d Cir. 1978).

⁶⁹ *Id.* at 478, 97 L.R.R.M. at 2844. The court in *Republic Steel* especially noted the International Union's ability to communicate with *all* locals in the event of sympathy strikes. *Id.*

⁷⁰ See *Republic Steel Corp. v. UMWA*, 570 F.2d 467, 480, 97 L.R.R.M. 2836, 2845 (3d Cir. 1978).

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¹ 29 U.S.C. §§ 651-678 (1976).

² 29 U.S.C. § 660(c)(1) (1976), provides:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

³ The regulation, 29 C.F.R. § 1977.12, as amended, 38 Fed. Reg. 4577 (1973), provides in part:

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act

alternative available for his protection, short of refusing to perform the assigned task and must act in good faith.⁴ Although the Act outlines a detailed procedure for reporting dangerous conditions, nowhere does it expressly provide that an employee has the right to refuse to perform an assigned job because of his perception of danger. Two circuit courts of appeals have reviewed the legislative history of the Act and held that the regulation is invalid because the Secretary exceeded his authority granted by the Act.⁵

During the *Survey* year a unanimous United States Supreme Court held in *Whirlpool Corp. v. Marshall*⁶ that in light of the Act's language, structure, and legislative history, the regulation is a valid exercise of the Secretary's authority, and constitutes a permissible gloss on the Act.⁷ The decision reflects the Court's belief that it would be "anomalous" to interpret the Act in a manner that would force a worker to choose between his job and a perceived risk of serious injury or death.⁸ The holding in *Whirlpool*, permitting employee "self-help" in certain circumstances, is of great importance to advocates of safety in the workplace. It remains to be seen, however, whether the lower federal courts will interpret the Act and regulation in a manner that will truly protect workers faced with highly dangerous job assignments.

will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(b)(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refused in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

⁴ *Id.*

⁵ *Marshall v. Daniel Constr. Co.*, 563 F.2d 707 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978); *Marshall v. Certified Welding Corp.*, No. 77-2084 (10th Cir., Dec. 28, 1978). In *Daniel Construction Co.*, the Fifth Circuit concluded from the legislative history of the Act that workers were given the right under the Act to request inspection of the employer's business premises *in lieu* of the right to leave the premises with pay. 563 F.2d at 713. Furthermore, because Congress expressly denied the Occupational Safety and Health Administration the right to issue a stop work order, the court found the Secretary's granting of the equivalent right to a worker to be in excess of the Secretary's authority under the Act. *Id.* at 715. The court expressed concern that an employee's abuse of the regulation could "cripple" his employer's business and stated that the legislative history of the Act was "manifest" that Congress desired to avoid such a result. *Id.*

⁶ 445 U.S. 1 (1980).

⁷ *Id.* at 11, 22.

⁸ *Id.* at 12.

Whirlpool Corporation operates a manufacturing plant in Marion, Ohio for the production of household appliances.⁹ Overhead conveyor belts transport component parts throughout the plant and a wire guard screen is suspended below the belt, approximately twenty feet above the plant floor, to catch parts that fall from the belt.¹⁰ It is the duty of the maintenance crew to remove these parts from the screen, a task which originally required that the worker occasionally step onto the screen.¹¹ In 1973 the unsafe nature of the screen was called to the company's attention and it began replacing the older screen with new, heavier mesh screen.¹² On June 28, 1974 an employee fell through a part of the guard screen that had not yet been replaced and was killed.¹³ Following this incident the company issued an order forbidding maintenance employees from stepping on the screen or the angle irons which supported it.¹⁴ Nevertheless, on July 7, 1974 two employees were directed to perform their regular maintenance duties on a section of the old screen.¹⁵ These employers earlier that day had expressed their concern about the safety of the screen to the plant maintenance superintendent, and also had notified the regional Occupational Safety and Health Administration (OSHA) office about the guard screen.¹⁶ Both employees refused to perform the assignment, claiming that the screen was unsafe.¹⁷ They were ordered to punch out without working or being paid for the six hours remaining of their shift, and a written reprimand was placed on their employment files.¹⁸

A month later the Secretary filed suit in the United States District Court for the Northern District of Ohio alleging that Whirlpool had violated section 11(c) (1) of the Act by discriminating against the employees for their reasonable refusal to walk on the guard screen.¹⁹ The district court held that although the employees' refusal to work was caused by a reasonable fear of death or serious bodily harm, and therefore was justified by the Secretary's regulation, relief must be denied because the regulation was inconsistent with the Act and consequently was invalid.²⁰ The Court of Appeals for the Sixth Circuit reversed and remanded the case for further proceedings, holding that the regulation was valid.²¹ The

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ *Usery v. Whirlpool Corp.*, 416 F. Supp. 30, 32-33 (N.D. Ohio 1976).

²⁰ *Id.* at 33. The district court found that the legislative history of the Act demonstrated that the regulation was "clearly inconsistent" with the Act. The court considered two aspects of the legislative history, the rejection of a "strike with pay" provision and the rejection of a provision entitling an OSHA inspector to shut down a plant. *Id.* at 33-34. See text at notes 26-36 *infra*.

²¹ *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 716 (6th Cir. 1979). The Sixth Circuit made a detailed analysis of the legislative history of the Act, concluding that the regulation is a valid exercise of the Secretary's authority and that it is consistent with the Act and with congressional intent. *Id.* at 736. The court stressed that the two provisions of the Act rejected by Congress, the strike with pay provision and the provision entitling an OSHA inspector to shut down a

Supreme Court granted Whirlpool's petition for certiorari.²²

Justice Stewart, writing for a unanimous Court,²³ found that "[t]he regulation clearly conforms to the fundamental objective of the Act — to prevent occupational deaths and serious injuries."²⁴ The regulation also assists the Act's "general duty" clause, the Court observed, which provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."²⁵ Finally, the Court stated that because safety legislation is to be construed liberally the regulation would be upheld unless the legislative history of the Act revealed that the regulation did not further the Act's overriding purpose.²⁶

Whirlpool presented two contentions in arguing that the legislative history of the Act revealed the invalidity of the Secretary's regulation.²⁷ Whirlpool's first contention was that Congress specifically had rejected an earlier draft of the Act that would have permitted employees, under certain circumstances, to refuse to perform a hazardous task without suffering a loss of compensation.²⁸ The Court, however, found Congress' rejection of this so-called "strike with pay" provision to be unpersuasive evidence of the regulation's invalidity for two reasons. First, the rejected provision applied to a different situation than that faced by the Whirlpool employees because it "did not concern itself at all with conditions posing real and immediate threats of death or severe injury."²⁹ Second, the provision's unpopularity apparently was due largely to the employee's continued right to receive compensation.³⁰ The Court noted that the Secretary's regulation, to the contrary, did not require employers to pay employees who refused hazardous assignments.³¹ The employer was simply not permitted, under section 11(c)(1) of the Act, to "discriminate" against the employee. Although the Court found that placing reprimands in the employees' files constituted such discrimination, the Court expressly noted that it was not deciding whether the employees' loss of six hours pay was discrimination under the Act.³²

The Court likewise was unimpressed with Whirlpool's second contention that Congress had rejected a proposed provision in the Act that would have

plant, were completely distinct from the rights created by the Secretary's regulation. *Id.* at 726-36.

²² 44 U.S. 823 (1979).

²³ *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 2 (1980).

²⁴ *Id.* at 11 (footnote omitted).

²⁵ *Id.* at 12-13, quoting 29 U.S.C. § 654(a)(1) (1976).

²⁶ 445 U.S. 13, quoting *United States v. Bacto-Unidisk*, 394 U.S. 784, 798 (1969); *Lilly v. Grand Trunk Railroad Co.*, 317 U.S. 481, 486 (1943).

²⁷ 445 U.S. at 13.

²⁸ *Id.* at 14-15. See Section 19(a)(5) of H.R. 16785, H.R. REP. NO. 1291, 91st Cong., 2d Sess. (1970). See also LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, SUBCOMMITTEE ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 1st Sess. 969-70 (June 1971) [hereinafter cited as LEGISLATIVE HISTORY].

²⁹ 445 U.S. at 17.

³⁰ *Id.*

³¹ *Id.* at 19.

³² *Id.* at 19 n.31.

permitted Labor Department officials to temporarily shut down all or part of the employer's plant in imminent danger situations.³³ Whirlpool contended that it would be contrary to congressional intent to allow employees the power to shut down an employer's plant when this same power was denied the Department of Labor.³⁴ The Court observed, however, that an employee only has the right to avoid highly hazardous situations, and does not have the authority to shut down a plant or to order the employer to correct the hazardous situation.³⁵ Thus, the regulation does not, the Court concluded, even remotely resemble the provision that Congress rejected.³⁶ Because the regulation was in accord with the purpose of the Act, and because the legislative history of the Act did not reveal a contrary congressional intent, the Court upheld the validity of the regulation and affirmed the decision of the Sixth Circuit Court of Appeals.³⁷

The *Whirlpool* decision reveals a willingness on the part of the Supreme Court to allow the Secretary of Labor to go beyond the formal protections of the Act so that a worker is not faced with a potentially tragic choice between his safety and his livelihood. There are, however, limits to the protection provided by the regulation and the Court's decision. The regulation does not apply to those situations where an assigned task is hazardous, but does not present a real danger of death or serious injury.³⁸ It applies only to the relatively unusual situation where the other protections guaranteed by the Act either have failed or have been delayed, and the employee is faced with an immediate and grave danger.³⁹ For example, after an employee has called the regional OSHA office and reported an imminently dangerous situation pursuant to 29 U.S.C. § 657(f), the regulation insures that the employee cannot be required to perform the dangerous task while waiting for the inspector to arrive. The regulation does not insure, however, that an employee will be able to assert his rights without having to face a substantial risk.

The Supreme Court indicated, although it did not decide, that the failure to pay an employee who refused to perform a life-threatening task does not necessarily constitute discrimination under the Act.⁴⁰ Should the lower courts, following this Supreme Court dictum, decide that the refusal to pay does not constitute discrimination under the terms of the Act, an employer conceivably could refuse to assign the employee to an alternate task. Thus, until the OSHA inspector was able to inspect the hazardous condition, the worker would return home safe at the end of the day, but penniless.

Furthermore, an employee who refused to perform a life-threatening assignment must gamble everything on the hope that OSHA or a judge will find his refusal to have been reasonable. The Sixth Circuit Court of Appeals, in its *Whirlpool* decision, described the prospects of an employee who has been fired

³³ *Id.* at 19-21. See LEGISLATIVE HISTORY, *supra* note 28, at 263-64, 855, 1193.

³⁴ 445 U.S. at 20.

³⁵ *Id.* at 21.

³⁶ *Id.*

³⁷ *Id.* at 22.

³⁸ See section (b)(1) of the regulation, *supra* note 3.

³⁹ 445 U.S. at 10-11.

⁴⁰ *Id.* at 19 n.31.

for refusing a dangerous assignment.⁴¹ The employee would lose, at least for the time being, his current income, acquired seniority, and his pension rights.⁴² If the Secretary files a complaint on the employee's behalf, the employee can regain these lost benefits only if he can prove: first, that he acted in good faith; second, that he had no reasonable alternative; third, that the situation he faced was one which would cause a reasonable person under the same circumstances to conclude that there is a real danger of death or serious injury; and fourth, that there was insufficient time to resort to regular enforcement channels.⁴³ These four requirements place a substantial burden on an employee.

Although the *Whirlpool* decision is a victory for advocates of safety in the workplace, the above scenarios suggest that an employee assigned to a dangerous task is still faced with a dilemma. The possibility of losing pay or of being fired are certainly adequate constraints to prevent employees from making frivolous claims of life-threatening danger. Unfortunately, even after the *Whirlpool* decision, an employee faced with a highly dangerous task still might be deterred from refusing to perform the task because of the risk to his livelihood. It is to be hoped that the lower federal courts will hold that the failure to pay an employee does constitute "discrimination" under the Act and that they will not place too heavy a burden of proof on the safety-conscious employee who has been fired for refusing to place his life in danger. Without this kind of assistance from the federal judiciary, the regulation upheld in *Whirlpool* will be of little practical value because of the continuing risk of sanctions against employees who assert the right that it creates.

V. RLA — PUNITIVE DAMAGES IN UNFAIR REPRESENTATION SUITS:

*International Brotherhood of Electrical Workers v. Foust**

The Supreme Court has interpreted the Railway Labor Act¹ (RLA) as imposing upon the union a duty to represent fairly the interests of all its members.² A union breaches this duty when it acts in an arbitrary, discriminatory, or bad faith manner toward employees, such as when it "arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion."³ While employees have a right, implied from the RLA, to bring unfair representation suits in the federal district courts, Congress has not specified what types of damages are available⁴ under this Act. Without legislative guidelines, the courts of appeals have developed different standards as to when punitive damages may be imposed. The Third Circuit has indicated that punitive dam-

⁴¹ 593 F.2d at 734-35.

⁴² *Id.* at 734.

⁴³ *Id.* at 735.

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¹ 45 U.S.C. §§ 151-164 (1976).

² *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). *See Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

³ 442 U.S. at 47.

⁴ *Id.*

ages in unfair representation suits may be impermissible,⁵ while the Eighth Circuit has awarded punitive damages only upon a finding that the union has expressed malice toward the employee.⁶ In contrast to these two approaches, the Tenth Circuit Court of Appeals, in *International Brotherhood of Electrical Workers (IBEW) v. Foust*,⁷ recently chose to follow the Fourth Circuit's view that punitive damages are proper where a union acts in wanton, malicious or callous disregard of an employee's right.⁸

During the *Survey* year, the Supreme Court granted certiorari⁹ to resolve the conflict between the circuits. The Court in its review of *IBEW v. Foust*¹⁰ held that under the RLA, punitive damages may not be imposed upon a union which breaches its duty of fair representation by failing to pursue a grievance in a proper manner.¹¹ The Court's holding in *Foust* is significant in that it denies recovery of punitive damages in *all* unfair representation actions under the RLA.¹² The *per se* denial of punitive damages eliminates the need for inquiry into the degree of the union's culpability. Once a breach is established, damages are awarded in a compensatory manner, with no reference to whether the union acted with intentional malice or mere negligence.

A review of the facts of *IBEW v. Foust* is necessary for a full understanding of the significance of a rule which denies punitive damages *per se*. The respondent in *IBEW v. Foust* was a member of the International Brotherhood of Electrical Workers.¹³ He was injured on the job, received a medical leave of absence, and subsequently was discharged after failing to make a proper request for an extension of his leave.¹⁴ Respondent's attorney then wrote to the union's district chairman to ask the union to initiate grievance proceedings on behalf of the respondent.¹⁵ This letter was received by the district chairman fifty-two days after the dismissal.¹⁶ Although the district chairman was aware that IBEW's collective-bargaining agreement required presentation of grievances "within 60 days from the date of the occurrence on which the claim . . . is based,"¹⁷ he did not immediately prepare a grievance letter.¹⁸ Instead, he contacted the union's general chairman, who insisted that respondent make a per-

⁵ *Deboles v. TWA*, 552 F.2d 1005, 94 L.R.R.M. 3237 (3d Cir. 1977), *cert. denied*, 434 U.S. 837, 96 L.R.R.M. 2514 (1977). While the Third Circuit Court of Appeals refused to decide what circumstances would justify punitive damages, the Court did indicate that such damages would not be proper in the absence of actual injury resulting from the union's wrongful conduct. *Id.*

⁶ *Butler v. Teamsters Local 823*, 514 F.2d 442, 88 L.R.R.M. 3169 (8th Cir. 1975), *cert. denied*, 423 U.S. 924 (1975).

⁷ 442 U.S. 42 (1979).

⁸ *Harrison v. United Transp. Union*, 530 F.2d 558, 90 L.R.R.M. 3265 (4th Cir. 1975), *cert. denied*, 425 U.S. 958, 92 L.R.R.M. 2168 (1976).

⁹ *IBEW v. Foust*, 439 U.S. 892 (1978).

¹⁰ 442 U.S. 42 (1979).

¹¹ *Id.* at 52.

¹² *Id.*

¹³ *Id.* at 43.

¹⁴ *Id.* at 43.

¹⁵ *Id.* at 44.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

sonal written request for the union's assistance.¹⁹ A letter to this effect was drafted by the general chairman and mailed to the district chairman. Sixty-one days after the discharge, the letter was forwarded to the respondent.²⁰ When the grievance claim was submitted finally, the employer denied respondent's claim on the ground that IBEW had not complied with the sixty-day requirement.²¹

The respondent then brought this suit in the Federal District Court for the District of Wyoming, alleging that the union breached its duty of fair representation in its handling of the grievance.²² The Wyoming district court instructed the jury that they could award punitive damages if they found that the union had acted " 'maliciously, or wantonly, or oppressively.' " ²³ The jury found for the respondent and awarded him \$40,000 actual damages and \$75,000 punitive damages.²⁴ The union subsequently appealed to the Court of Appeals for the Tenth Circuit.²⁵ The Court of Appeals affirmed the judgment of the district court in part and remanded on the issue of whether punitive damages were excessive.²⁶ The court of appeals held that "[w]anton conduct or reckless disregard for the rights of the employees" justifies the award of punitive damages against the union.²⁷

Because this standard differed from those used by the Third and Eighth Circuits, the Supreme Court granted certiorari²⁸ to decide what circumstances justify awarding punitive damages against a union that breaches its duty of fair representation under the RLA.²⁹ The Court held that under the RLA, punitive damages could not be assessed against a union which breached its duty of fair representation.³⁰ According to the Court's reasoning, since Congress had not specified what remedies were available under the RLA in unfair representation suits, it was the Court's function to "implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act."³¹ In fulfilling this function, the Court stated four reasons which supported denial of punitive damages in every case of union breach of representation.

First, the Court reviewed the cases of *Steele v. Louisville & Nashville R.R.*³² and *Vaca v. Sipes*³³ and discerned that the fundamental purpose of unfair representation suits is to compensate the employee.³⁴ In addition, the *Foust* Court stated that the compensation principle as applied in *Vaca* is meant not only as a

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 44-45.

²³ *Foust v. IBEW*, 572 F.2d 710, 719, 97 L.R.R.M. 3040, 3047 (10th Cir. 1978).

²⁴ *IBEW v. Foust*, 442 U.S. at 45.

²⁵ *Foust v. IBEW*, 572 F.2d at 711, 97 L.R.R.M. at 3041.

²⁶ *Id.* at 719, 97 L.R.R.M. at 3047.

²⁷ *Id.*

²⁸ *IBEW v. Foust*, 439 U.S. at 892 (1978).

²⁹ *IBEW v. Foust*, 442 U.S. at 46.

³⁰ *Id.* at 52.

³¹ *Id.* at 47.

³² 323 U.S. 192 (1944) (relief should be fashioned to make the injured employee whole).

³³ 386 U.S. 171 (1967) (damages and equitable relief allowed to ensure full compensation).

³⁴ *IBEW v. Foust*, 442 U.S. at 48-49.

measure of relief to the injured employee, but as a limit on the union's liability.³⁵ The Court sought to limit the union's liability in order to protect their limited funds.³⁶ In the Court's view punitive damages would exceed the compensatory limitation, and, therefore, should not be allowed in unfair representation suits.³⁷

The Court's second reason for denying punitive damages, was that federal labor policy generally is remedial and thus disfavors awards of punitive damages.³⁸ In support of this view, the Court cited its rejection of punitive damages in certain unfair labor practice cases under the National Labor Relations Act³⁹ and in actions under section 303 of the Labor Management Relations Act.⁴⁰

The third reason expressed by the *Foust* Court in favor of the *per se* rule not permitting punitive damages, was that such damages, if allowed, could deplete union treasuries and thus impair the effectiveness of unions as collective-bargaining agents.⁴¹ The Court stated that because juries have such broad discretion in determining the amount of punitive damages, the impact of recoveries would be unpredictable and potentially substantial.⁴²

The final reason against punitive damages which the Court offered was that these damages would curtail the discretion the union enjoys in handling grievances and thus would undermine peaceful labor negotiations.⁴³ According to the Court, the fear of punitive damages would force unions to "process frivolous claims or resist fair settlements."⁴⁴ This in turn would weaken the employer's confidence in the union and disrupt collective bargaining.⁴⁵ The Court thus summarized that because general labor policy does not favor punitive damages and because these damages would have substantial adverse effects on the unions, a union should not be liable for punitive damages when it breaches its duty of fair representation.⁴⁶ Accordingly, the court of appeals' decision, insofar as it allowed punitive damages, was reversed.⁴⁷

Justice Blackmun, with whom Chief Justice Burger, Justice Rehnquist and Justice Stevens joined, concurred in the *Foust* result.⁴⁸ Justice Blackmun, however, rejected the majority's *per se* rule, which disallowed punitive damages for all breaches of the duty of fair representation.⁴⁹ The concurring Justices found the *per se* rule unacceptable because it did not allow for consideration of

³⁵ *Id.* at 49.

³⁶ *Id.* at 49-50.

³⁷ *Id.*

³⁸ *Id.* at 52.

³⁹ *Id.* See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). The National Labor Relations Act is codified at 29 U.S.C. §§ 151-168 (1976).

⁴⁰ *Id.* See *Teamsters Local 20 v. Morton*, 337 U.S. 252 (1964). Section 303 of the Labor Management Relations Act is codified at 29 U.S.C. § 187 (1976).

⁴¹ *IBEW v. Foust*, 442 U.S. at 50-51.

⁴² *Id.* at 50.

⁴³ *Id.* at 51-52.

⁴⁴ *Id.* at 52.

⁴⁵ *Id.* at 51.

⁴⁶ *Id.* at 52.

⁴⁷ *Id.*

⁴⁸ *Id.* (Blackmun, J., concurring).

⁴⁹ *Id.* at 53.

how egregious the breach may have been.⁵⁰ According to the concurring Justices, "[i]f a union's conduct should reveal intentional racial discrimination, deliberate personal animus, or conscious infringement of speech and associational freedoms . . . no principle of federal labor policy . . . stands in the way of punitive award."⁵¹ The proper disposition of this case, in Justice Blackmun's view, would have been to hold that the trial judge erred in submitting the issue of punitive damages to the jury.⁵² In defense of this position, Justice Blackmun examined the four rationales of the majority and found them all unpersuasive.

Justice Blackmun asserted that the compensation theory expressed in *Vaca* and *Steele* does not limit the employee's ability to recover damages.⁵³ The majority was incorrect, according to Justice Blackmun, when it "converted the floor beneath the injured employee's remedies into a ceiling on top of them."⁵⁴ The concurring Justice explained that the *Vaca* Court's limitation on union liability is also inapplicable to this case because *Vaca* involved a situation where all of the worker's damages were attributable to the employer and consequently, the case stands only for the proposition that a union which is not liable for compensatory damages is also not liable for punitive damages.⁵⁵ Therefore, the concurrence did not find support in *Vaca* and *Steele* for a compensation theory which would disallow punitive damages.

The concurrence was equally unpersuaded by the Court's view that the remedial nature of federal labor policy is inhospitable to punitive damage awards. Justice Blackmun viewed the two major cases, cited by the Court as support for this theory, as having no pertinence in the present situation.⁵⁶ He explained that the first only held that punitive damages were beyond the National Labor Relations Board's authority as a matter of jurisdiction and the second only stood for the proposition that, as a matter of statutory construction, section 303⁵⁷ expressly disallows punitive damages.⁵⁸ Neither of these cases, Justice Blackmun asserted, concerned unfair representation suits and therefore they were not valid precedent.⁵⁹

Addressing the final two rationales offered by the Court in support of its *per se* rule, the concurrence stated that there would be no unacceptable risk of injury to union treasuries if punitive awards were allowed only in the rare cases where the union has behaved notoriously.⁶⁰ The concurrence noted that even if a risk existed, concern over a union's financial condition is not proper support

⁵⁰ *Id.*

⁵¹ *Id.* at 60.

⁵² *Id.* Justice Blackmun stated that the union's conduct in *IBEW v. Foust* was nothing more than negligence and since punitive damages were not proper the case provided an inappropriate basis for the holding that punitive damages are always unavailable. *Id.*

⁵³ *Id.* at 55.

⁵⁴ *Id.* at 54.

⁵⁵ *Id.* at 55.

⁵⁶ *Id.* at 56. The two cases are *Vaca v. Sipes*, 386 U.S. 171 (1967) and *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

⁵⁷ 29 U.S.C. § 187 (1976).

⁵⁸ *IBEW v. Foust*, 442 U.S. at 55-56.

⁵⁹ *Id.*

⁶⁰ *Id.* at 57.

for a "proscription of punitive damages where the union's fault is egregious."⁶¹ Finally, the concurring Justices stated that the rationale that punitive damages would curtail the union's discretion and thus weaken its ability to bargain effectively is far too tenuous an argument.⁶² Even if it were not tenuous, Justice Blackmun commented that, in truly egregious breaches a chilling effect on the union's discretion would not be bothersome.⁶³ Thus, while the concurring Justice agreed that punitive damages were not warranted under the present facts, they stated that instead of creating an "across the board" rule prohibiting damages, punitive damages should only be prohibited in situations where the union's breach was not outrageous.⁶⁴

The position of the concurring Justices is more persuasive once the nature of the union-employee relationship is analyzed. Because the union is the *exclusive* representative of the employee, it owes a duty to represent fairly the employee's interests. This duty was first recognized in *Steele* where the Court reasoned that when Congress gave the unions the power to be the exclusive representatives of bargaining units, it subordinated the employee's individual interest to the interests of the union as a whole.⁶⁵ This grant of union authority, the Court held, imposed on the unions a correlative duty to use the authority fairly.⁶⁶ When this duty is breached, either intentionally or maliciously, strong sanctions against the punitive damages for unfair representation ignores the fiduciary nature of the union-employee relationship which arises from the requirement of exclusivity.

A further rationale for the imposition of punitive damages in unfair representation suits is found in the special nature of these suits. Because unfair representation suits involve union-employee disputes instead of union-employer disputes, the *Foust* majority should not have viewed the denial of punitive damages for unfair representation as merely an extension of the refusal to impose punitive damages for Taft-Hartley unfair labor practices⁶⁷ or section 303 secondary boycotts.⁶⁸ The special union-employee relationship is not involved in either of these offenses. Instead these suits usually involve actions by employers against the unions. A closer analogy to unfair representation suits would be the availability of punitive damages under Section 102 of the Landrum-Griffin Act.⁶⁹ This Act seeks to protect the union member's "bill of rights."⁷⁰ In this regard, it is similar to unfair representation suits in that the

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 58.

⁶⁴ *Id.* at 60. The impact of *IBEW v. Foust* is lessened by Justice Blackmun's compelling assertion that the union "betrayed nothing more than negligence" and therefore there is no basis for a sweeping prohibition of punitive damages when a union commits wanton, malicious or oppressive acts. *Id.* at 53. The majority responded to this view by stating that the degree of the union's culpability, essentially an evidentiary question, was found by the jury to be either malicious, wanton, or oppressive and, therefore, the record does support the *per se* rule. *Id.* at 48 n.7.

⁶⁵ *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202-04 (1944).

⁶⁶ *Id.* at 202-03.

⁶⁷ See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940).

⁶⁸ See *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964).

⁶⁹ 29 U.S.C. § 412 (1976).

⁷⁰ 29 U.S.C. § 411 (1976). The Court in *IBEW v. Foust* refused to express a view on the propriety of punitive damages in suits under the Landrum-Griffin Act. 442 U.S. at 47 n.9.

employee is suing the union for a wrong done to the employee. In every federal court of appeals which has addressed the issue, punitive damages were allowed under the Landrum-Griffin Act when the union's conduct was malicious, reckless or wanton.⁷¹ Similarly, punitive damages should be allowed for a malicious or intentional breach of the union's duty of fair representation under the Railway Labor Act.

The stability of the *per se* rule of *Foust* is open to the same question because it was announced in a five to four decision. At present, however, at least two things are certain. First, all of the Justices agree that when a union is merely negligent in breaching its duty of fair representation under the RLA, punitive damages are *not* appropriate. Second, no matter what the future rule may be, under the current law punitive damages are not allowed in any unfair representation suit under the RLA.

⁷¹ *Keene v. Operating Engineers Local 624*, 569 F.2d 1375, 97 L.R.R.M. 3215 (5th Cir. 1978); *Morrissey v. National Maritime Union*, 544 F.2d 19, 92 L.R.R.M. 3211 (2d Cir. 1976); *Cooke v. Orange Belt Dist. Council*, 529 F.2d 815, 91 L.R.R.M. 2349 (9th Cir. 1976).

EMPLOYMENT DISCRIMINATION LAW

I. SUITS INVOLVING EMPLOYMENT DISCRIMINATION

A. *Timely Filing*1. *Timely Filing Under Section 626(d) of the ADEA: Ciccone v. Textron, Inc.**

The Age Discrimination in Employment Act of 1967¹ (ADEA) is designed to promote the employment of older persons² by prohibiting employers from discriminating against employees on the basis of age.³ In order to bring a private action to enforce the Act's provisions, a complainant first must satisfy several procedural requirements.⁴ In particular, a complainant must file a charge⁵ with the EEOC⁶ at least sixty days prior to instituting an action in federal court⁷ and within 180 days after the alleged discriminatory act occurred.⁸ The 180-day period is expanded to 300 days⁹ where the alleged unlawful practice occurs in a so-called deferral state.¹⁰ Another provision of the ADEA provides that a complainant in a deferral state must wait 60 days after

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¹ 29 U.S.C. §§ 621-634 (1976).

² The Act extends protection to persons aged 40-64. See 29 U.S.C. § 631 (1976).

³ See 29 U.S.C. § 621 (1976).

⁴ See 29 U.S.C. §§ 626(d)(1) & (2), 633(b) (1976).

⁵ Section 4(b)(1) of the 1978 amendments to the ADEA amends § 7(d) of the Act, 29 U.S.C. § 626(d), to provide that merely a "charge" rather than a notice of intent to sue be filed with the Secretary of Labor. See Pub. L. No. 95-256 (1978). Hereinafter the words "charge" and "notice" will be used interchangeably.

⁶ Discrimination charges no longer can be filed with the Secretary of Labor. See 29 U.S.C. § 626(d). As of July 1, 1979, the Equal Employment Opportunity Commission (EEOC) administers the ADEA. See Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). Discrimination charges now must be filed with the EEOC within the applicable federal time periods. For purposes of this article, however, the Department of Labor will be used as the agency for filing a federal charge of age discrimination.

⁷ 29 U.S.C. § 626(d) (1976). For the text of this section, see note 8 *infra*.

⁸ 29 U.S.C. § 626(d)(1) (1976). Section 626(d)(1) & (2) provides as follows:

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

- (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
- (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

⁹ 29 U.S.C. § 626(d)(2) (1976). See note 8 *supra*.

¹⁰ A deferral state is one which has a law "prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice. . . ." See 29 U.S.C. § 633(b) (1976), reprinted at note 11 *infra*. Section 633(b) requires that there be a sixty-day waiting period after proceedings are commenced with the appropriate authorities in a deferral state before a federal court action can be instituted.

commencing appropriate state administrative proceedings before he can bring a federal suit.¹¹ There has been some confusion among the courts concerning the effect of this latter provision. Some courts have viewed it as requiring the commencement of state administrative proceedings prior to bringing a federal court action.¹² Others have viewed it as providing an option to resort to those proceedings and thus have held that the 60-day waiting period is applicable only if the option is exercised.¹³

In *Oscar Mayer & Co. v. Evans*,¹⁴ the Supreme Court settled this controversy. In *Evans*, the Court held that, under the deferral state provision, resort to available state administrative proceedings is mandatory before the institution of a federal suit.¹⁵ The *Evans* Court also decided, however, that a complainant is not required to commence these proceedings within the time limits specified by state law. Thus, if a federal suit had already been improperly instituted, it would be held in abeyance in order to allow a complainant to commence state proceedings.¹⁶ The question that the Court's decision in *Evans* leaves unanswered is whether the expanded 300-day period for filing notice under section 626(d)(2) applies to all complainants in deferral states or only to those who actually have instituted proceedings with appropriate state authorities within the 180-day time limit. Since the time period for filing a charge with the EEOC potentially bars a complainant's access to the courts, a particular court's construction of this provision can have a decisive impact upon the availability of the statutory remedy to victims of age discrimination.

During the *Survey* year, the United States Courts of Appeals for the First and Ninth Circuits were confronted with the issue of the proper construction of section 626(d)(2) of the ADEA. In *Cicccone v. Textron, Inc.*,¹⁷ the Court of Appeals for the First Circuit held that a complainant in a deferral state must file a

¹¹ 29 U.S.C. § 633(b) (1976). This section provides as follows:

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

29 U.S.C. § 633(b) (1976).

¹² See, e.g., *Curry v. Continental Airlines*, 513 F.2d 691, 693, 10 FEP Cas. 625, 626 (9th Cir. 1975); *Goger v. H.K. Porter Co.*, 492 F.2d 13, 16, 7 FEP Cas. 71, 72-73 (3d Cir. 1974).

¹³ See, e.g., *Goger v. H.K. Porter Co.*, 492 F.2d 13, 17, 7 FEP Cas. 71, 73 (3d Cir. 1974) (Garth, J., concurring) (complainant need not exercise available state remedies); *Vazquez v. Eastern Airlines, Inc.*, 405 F. Supp. 1353, 1357, 12 FEP Cas. 686, 689 (D.P.R. 1975) (prior resort to state proceedings is not prerequisite).

¹⁴ 441 U.S. 750 (1979).

¹⁵ *Id.* at 753.

¹⁶ *Id.*

¹⁷ 616 F.2d 1216, 22 FEP Cas. 497 (1st Cir. 1980).

charge of age discrimination with the appropriate state authority within 180 days after the alleged act in order to qualify for the expanded 300-day period for filing a charge¹⁸ with the Department of Labor under that section.¹⁹ Conversely, in *Bean v. Crocker National Bank*,²⁰ the Ninth Circuit Court of Appeals held that, in a deferral state, a complainant need not commence state proceedings within 180 days in order to qualify for the extended 300-day time period.²¹ Thus, on the one hand, under the First Circuit Court of Appeals' decision in *Ciccone*, a complainant in a deferral state must elect to commence state proceedings within a 180-day time period after the discriminatory act or he will be barred from claiming qualification for the expanded filing period under section 626(d)(2). On the other hand, under the Ninth Circuit Court of Appeals' decision in *Bean*, no such bar to qualification under that section exists.

In *Ciccone*, the plaintiff, a fifty-three-year-old male, was discharged from his job with the defendant, Textron, Inc.²² Approximately seven months later, believing that the position he once held was vacant, the plaintiff wrote to the president of Textron to inquire about reemployment with the defendant.²³ The president responded negatively to the plaintiff's inquiry, but promised to contact the plaintiff if any other position became available.²⁴ Approximately 205 days after the defendant's refusal to rehire him,²⁵ the plaintiff filed charges of age discrimination with the Department of Labor and the state agency designated for that purpose.²⁶ The plaintiff alleged that his discharge and the defendant's refusal to rehire him constituted discriminatory acts in violation of the ADEA.²⁷ Sixty days passed without action by either the state or the federal authorities on the plaintiff's claim.²⁸ Subsequently, the plaintiff brought suit against the defendant in district court alleging age discrimination under the ADEA.²⁹ The defendant filed a motion to dismiss the complaint³⁰ based on the

¹⁸ See note 5 *supra*.

¹⁹ 616 F.2d at 1220, 22 FEP Cas. at 500.

²⁰ 600 F.2d 754, 20 FEP Cas. 533 (9th Cir. 1979).

²¹ *Id.* at 759, 20 FEP Cas. at 536.

²² 616 F.2d at 1217, 22 FEP Cas. at 498.

²³ *Id.*

²⁴ *Id.*

²⁵ This filing was also 433 days after the plaintiff's initial discharge. *Id.*

²⁶ This state agency was created pursuant to Rhode Island's age discrimination law. See R.I. GEN. LAWS tit. 28, ch. 6, §§ 1-16 (1978), which declares age discrimination to be unlawful and establishes a procedure for the processing of complaints. The court in *Ciccone*, however, did not find it necessary to decide whether Rhode Island was, by virtue of this statute, a deferral state for purposes of 29 U.S.C. § 633(b). The Court reasoned that, regardless of whether Rhode Island was a deferral state, the plaintiff had failed to commence state proceedings within 180 days of the discriminatory act pursuant to section 626(d). Since, under the court's view, a plaintiff in a deferral state must commence state proceedings in order to qualify for the extended time period pursuant to section 626(d)(2), the plaintiff could not prevail even if Rhode Island turned out to be a deferral state for purposes of section 633(b). Thus, the court avoided deciding this issue. See 616 F.2d at 1221 n.6, 22 FEP Cas. at 500 n.6.

²⁷ 616 F.2d at 1217, 22 FEP Cas. at 498.

²⁸ *Id.*

²⁹ *Id.*

³⁰ In support of the motion to dismiss, the defendant filed an affidavit from its senior vice president stating that the plaintiff's employment position had been discontinued and the duties of the job reassigned to other employees. *Id.*

plaintiff's alleged failure to comply with the timely filing requirements of the ADEA.³¹ The district court decided that the plaintiff's action was barred under section 626(d)(1) because, under that section, the plaintiff had failed to file his charges with the Department of Labor within 180 days of the last discriminatory act.³² Finding that the plaintiff was unable to demonstrate special facts to justify equitably tolling the time period,³³ the district court granted the defendant's motion to dismiss.³⁴

On appeal, the Court of Appeals for the First Circuit affirmed.³⁵ The court held that the plaintiff had failed to file with the state agency within the 180-day limit required under its interpretation of section 626(d)(2).³⁶ The court rejected the plaintiff's argument that, since the state in which the alleged violation arose was a deferral state within the meaning of section 633(b),³⁷ he therefore was entitled to 300 days in which to file his charge with the Department of Labor under section 626(d)(2) without actually having filed with the state agency.³⁸ The court, instead, found that under section 626(d)(2) a plaintiff must file charges with the deferral state agency within 180 days of the alleged violation in order to qualify for the extended 300-day period.³⁹ The *Ciccone* court reached this result by reasoning that the expanded filing period under section 626(d)(2) is, according to the language of the section, only available "in a case to which section 633(b) . . . applies"⁴⁰ Section 633(b), however, merely provides

³¹ *Id.*

³² The district court held that the proper deadline for filing with the Department of Labor was the 180-day period under 29 U.S.C. § 626(d)(1). Under this time period, the plaintiff's claims based on both his discharge and the refusal to rehire were time barred. See note 25 *supra*. The district court noted that, if the 300-day period of section 626(d)(2) applied, then the plaintiff might prevail if the refusal to rehire constituted a separate violation. On this issue, the district court held that the defendant's refusal did not constitute a separate violation since the plaintiff's position had been abolished by the time he applied for reemployment. See *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485, 489, 8 FEP Cas. 1, 4 (5th Cir. 1974) (refusal to rehire cannot constitute a new violation in the absence of a job to be filled). The court of appeals noted that the district court ultimately rested its decision on the premise that 180 days was the applicable time period. In order to determine whether the district court had erred in not applying the expanded period of 300 days under § 626(d)(2), the court of appeals assumed, without deciding, that the refusal to rehire would constitute a separate violation. 616 F.2d at 1218, 22 FEP Cas. at 499.

³³ 616 F.2d at 1218, 22 FEP Cas. at 499. On this issue, the district court permitted limited discovery. The defendant took the plaintiff's deposition. During the course of the deposition, the plaintiff stated that he had learned from employees of the defendant that his former position had been filled by a younger man who had been given a new title. On this basis, the plaintiff moved for reconsideration of the district court's finding that the refusal to rehire did not amount to a separate violation. The district court refused to reconsider its holding until the plaintiff established that he was entitled to equitable tolling of the 180-day time period. *Id.* 22 FEP Cas. at 498-99.

³⁴ *Id.* 22 FEP Cas. at 499.

³⁵ *Id.* at 1221, 22 FEP Cas. at 502.

³⁶ *Id.* at 1220, 22 FEP Cas. at 500.

³⁷ Because the court ultimately held that the plaintiff had failed to comply with the time requirement of 29 U.S.C. § 626(d)(1) (1976), the court refused to decide whether Rhode Island was a deferral state. See note 26 *supra*.

³⁸ 616 F.2d at 1221, 22 FEP Cas. at 501.

³⁹ *Id.* at 1220, 22 FEP Cas. at 500.

⁴⁰ *Id.*

that "[i]n the case of an alleged unlawful practice occurring in a [deferral state], no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law" ⁴¹ Thus, that section speaks only to the waiting period that must be complied with in order for a deferral-state complainant to commence federal action. It, therefore, does not resolve the issue whether such a complainant must actually commence state proceedings within 180 days of the alleged discriminatory act, the time in which a nondeferral-state complainant must file his federal charge, in order to qualify for the expanded 300-day period in which to file his charge with the Department of Labor. As the *Ciccone* court recognized, the two statutory sections can be read, simplistically, as providing that the 300-day filing period is automatically available to all plaintiffs residing in a deferral state even if they fail to initiate a state charge within 180 days. ⁴² According to the court, however, the only "sensible" inference is that section 633(b) does not "apply" under the terms of 626(d)(2), "unless the complainant has diligently sought a state administration remedy — if not within the state's limitations period, then at least within the generally longer 180 days afforded plaintiffs in a nondeferral state." ⁴³ In reaching this conclusion, the court reasoned that to read the section otherwise would furnish the plaintiff with a windfall of an additional 120 days simply because his claim fortuitously arose in a deferral state. ⁴⁴ In the court's view, this windfall would not further the purpose of the extended filing period which is to give plaintiffs a grace period within which to pursue state remedies before being compelled to institute a federal charge. ⁴⁵ Thus, the court concluded that "[i]t is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor" ⁴⁶

The *Ciccone* court also rejected the plaintiff's reliance on the recent Supreme Court decision in *Oscar Mayer & Co. v. Evans*. ⁴⁷ In *Evans*, the Supreme Court held that, under section 633(b), before a complainant can bring a suit in federal court, he must first resort to appropriate state administrative proceedings, if available. ⁴⁸ The Court ruled, however, that a complainant was not required by that section to commence the state proceedings within the time limits specified by state law in order to satisfy this requirement. ⁴⁹ According to the plaintiff in *Ciccone*, *Evans* implied that the extended filing period of section 626(d)(2) should be available regardless of the plaintiff's untimely resort to

⁴¹ See note 11 *supra*.

⁴² 616 F.2d at 1220, 22 FEP Cas. at 500.

⁴³ *Id.* In this case, Rhode Island had a four month statute of limitations. See R.I. GEN. LAWS, tit. 28, ch. 6, § 10 (1978).

⁴⁴ 616 F.2d at 1220, 22 FEP Cas. at 500, 501. See *Olsen v. Rembrandt Printing Co.*, 511 F.2d 1228, 1231-32, 10 FEP Cas. 27, 29 (8th Cir. 1975) (en banc) (with regard to Title VII).

⁴⁵ 616 F.2d at 1220, 22 FEP Cas. at 501.

⁴⁶ *Id.* at 1221, 22 FEP Cas. at 501 (quoting *Gabriele v. Chrysler Corp.*, 573 F.2d 949, 955, 17 FEP Cas. 200, 204 (6th Cir. 1978)). See also *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 192 n.5, 16 FEP Cas. 510, 513-14 n.5 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

⁴⁷ 441 U.S. 750 (1979).

⁴⁸ *Id.* at 753.

⁴⁹ *Id.*

state proceedings.⁵⁰ In refusing to accept this argument, the First Circuit Court of Appeals noted that the Supreme Court in *Evans* said nothing to indicate that a deferral-state plaintiff who waited more than 180 days before filing any administrative charge would nonetheless be entitled to the extended filing period.⁵¹ On the contrary, the *Ciccone* court found that the only language in *Evans* that touched on this point suggested the opposite result.⁵² Thus, the court affirmed the district court's dismissal of the plaintiff's complaint.⁵³

In *Bean v. Crocker National Bank*,⁵⁴ a similar case occurring in a deferral state, the Ninth Circuit Court of Appeals read the Supreme Court's decision in *Evans* to support a result opposite to that of the *Ciccone* court. In *Bean*, the plaintiffs were discharged from their jobs with the defendant, the Crocker National Bank.⁵⁵ Less than 180 days after the alleged act of discrimination occurred, nine plaintiffs filed a charge with the Department of Labor but failed to commence available deferral-state proceedings.⁵⁶ Two other plaintiffs failed to file either a federal charge or to commence state proceedings within this period.⁵⁷ After notification by the Department of Labor that conciliation efforts had failed, the plaintiffs brought a class action suit in federal district court.⁵⁸ The court granted the defendant's motion for summary judgment, holding that the nine plaintiffs' failure to commence state proceedings pursuant to section

⁵⁰ 616 F.2d at 1221, 22 FEP Cas. at 501. The plaintiff conceded that the Supreme Court in *Evans* had held that resort to state remedies pursuant to § 633(b) is required before the plaintiff can proceed with a federal action. Nevertheless, the plaintiff pointed out that the Court decided that the filing of state charges need not be timely under state law because the federal suit could be held in abeyance until such charges were filed. Based on this part of the holding, the plaintiff contended that the extended filing period of § 626(d)(2) should be available without regard to the timeliness of his resort to state remedies. This conclusion, according to the plaintiff, followed from the fact that, under *Evans*, he could commence state proceedings at a date subsequent to filing his federal charge. *Id.*

⁵¹ *Id.*

⁵² *Id.* The *Ciccone* court noted that, in answering the argument that its decision to disregard state statutes of limitations would encourage complainants to sidestep state procedures. The Supreme Court in *Evans* stated:

In any event, even if the risk of bypass of state agencies were real, which it is not, States could readily avoid the possibility by extending their limitations periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor.

441 U.S. at 764 n.11.

According to the *Ciccone* court, this statement implies that the state limitations period on filing state charges will be harmonized with the federal period for filing such charges if both are set at 180 days. The court stated that this statement did not imply "that state and federal charges can be filed concurrently more than 180 days after an alleged violation." 616 F.2d at 1221, 22 FEP Cas. at 501 (emphasis in original).

⁵³ 616 F.2d at 1221, 22 FEP Cas. at 502. There was no dissent.

⁵⁴ 600 F.2d 754, 20 FEP Cas. 533 (9th Cir. 1979).

⁵⁵ *Id.* at 756, 20 FEP Cas. at 534.

⁵⁶ *Id.* The plaintiffs, however, failed to file charges with the California Fair Employment Practice Commission. According to the district court in this case, this state agency was a deferral-state authority within the meaning of 29 U.S.C. § 633(b) (1976). *Id.* at 757, 20 FEP Cas. at 534. See *Berry v. Crocker Nat'l Bank*, 13 FEP Cas. 673, 676-77 (N.D. Cal. 1976).

⁵⁷ 600 F.2d at 756 n.5, 20 FEP Cas. at 534 n.5. One plaintiff filed notice 229 days after his discharge. The other plaintiff failed to file any notice.

⁵⁸ *Id.* at 756-57, 20 FEP Cas. at 534.

633(b) deprived the court of jurisdiction over their suit.⁵⁹ The district court reached this conclusion by finding that section 626(d) required the plaintiffs to resort to state remedies, pursuant to section 633(b), as a jurisdictional prerequisite to maintaining their federal suit.⁶⁰ In addition, the district court dismissed the action of the two other plaintiffs because neither had filed a charge with the Department of Labor in compliance with the requirement of 180 days under section 626(d).⁶¹ The court reasoned that in order for the plaintiff in a deferral state to qualify for the expanded 300-day period in which to file a federal charge, he must have commenced state proceedings within 180 days of the alleged ADEA violation.⁶²

On appeal, the Ninth Circuit Court of Appeals reversed and remanded the case.⁶³ First, with respect to the plaintiffs who had filed timely notice with the Department of Labor but had failed to commence state proceedings, the court held that this failure did not bar a federal court action.⁶⁴ The *Bean* court reasoned that, under the Supreme Court's decision in *Evans*, the federal suit could be held in abeyance until the plaintiffs had the opportunity to commence state proceedings.⁶⁵ Second, with respect to the plaintiffs who had failed to file notice within 180 days or to commence state proceedings, the court held that the same reasoning applied and allowed their federal suits to proceed.⁶⁶ Reading the Supreme Court's decision in *Evans* to sanction a plaintiff's untimely commencement of deferral-state proceedings,⁶⁷ the *Bean* court decided that a complainant in a deferral state may provide notice within 300 days of the alleged discriminatory act regardless of whether state proceedings have been timely commenced.⁶⁸ Thus, the court ruled that all of the plaintiffs had filed their federal notice in a timely fashion within the applicable 300-day period of section 626(d)(2).⁶⁹

The inconsistent results between the *Ciccone* and the *Bean* courts stem from the fact that the Supreme Court's decision in *Evans*, on which each court relied, can be read to permit each of their different statutory interpretations. Had the Supreme Court limited its decision in *Evans* to the holding that a complainant in a deferral state must resort to state administrative proceedings under section 633(b), this inconsistency between the two circuit courts might not have occur-

⁵⁹ *Id.* at 757, 20 FEP Cas. at 534.

⁶⁰ *Id.*

⁶¹ *Id.* See note 57 *supra*.

⁶² See 600 F.2d at 757, 20 FEP Cas. at 535.

⁶³ *Id.* at 760, 20 FEP Cas. at 537.

⁶⁴ *Id.* at 757, 20 FEP Cas. at 535.

⁶⁵ *Id.*, 20 FEP Cas. at 534.

⁶⁶ *Id.* at 759, 20 FEP Cas. at 536.

⁶⁷ *Id.* at 757, 20 FEP Cas. at 534-35. In *Evans*, the Supreme Court, after deciding that a complainant must resort to appropriate administrative remedies in deferral states before seeking federal relief, held that the failure to file a complaint with a deferral-state agency within the state's statute of limitations does not bar federal court action. See 441 U.S. at 764.

⁶⁸ 600 F.2d at 759, 20 FEP Cas. at 536.

⁶⁹ *Id.* at 760, 20 FEP Cas. at 537. As to the plaintiff who never filed federal charges, the court allowed him to participate in the class action as an unnamed class member. The court interpreted the Supreme Court's decision in *Evans* as suggesting that unnamed parties in a class action may join in the litigation without having personally complied with the notice requirement of 29 U.S.C. § 626(d). *Id.* at 760, 20 FEP Cas. at 536-37 (citing 441 U.S. at 758 n.6).

red.⁷⁰ Instead, however, the *Evans* Court created confusion by adding that a complainant's failure to institute state proceedings within the state's statute of limitations would not bar a federal court action because the federal suit would be held in abeyance until the complainant could commence state action.⁷¹ Thus, the First Circuit Court of Appeals in *Ciccone* read *Evans* to require that a complainant commence deferral-state proceedings no later than 180 days after the alleged violation in order to qualify for the expanded time period.⁷² In contrast, the Ninth Circuit Court of Appeals in *Bean* interpreted this holding to mean that it is not necessary for a complainant in a deferral state to commence state proceedings within 180 days of the alleged violation in order to qualify for the extended filing period under section 626(d)(2).⁷³

It is submitted that, with respect to the two courts' interpretations of the timely filing requirements of the ADEA, the First Circuit Court of Appeals' decision in *Ciccone* is the correct one. One reason why the Ninth Circuit Court of Appeals' holding in *Bean* is less persuasive than *Ciccone* is that it is not in keeping with the congressional purpose behind either section 626(d)(2) or section 633(b). The evident purpose underlying section 626(d)(2) is to prevent the penalization of those complainants who pursue available state remedies before filing their federal charge with the EEOC.⁷⁴ This statutory provision gives these complainants a grace period for filing federal notice. If the holding in *Bean* is followed, those complainants who purposely bypass available state remedies and proceed directly to the federal remedy are given a windfall of 120 days to file a federal charge. This windfall has absolutely no relation to the purpose behind the expanded time requirement, but rather is based solely on the fortuitous circumstance that the claim arises in a state which has laws to protect the complainant. Ironically, under the *Bean* decision, these state laws would serve little purpose other than to enable a complainant to qualify for the extended filing period under federal law so he can pursue his federal remedy. Moreover, this consequence of reducing the usefulness of state remedies is contrary to the congressional purpose of section 633(b) which is to make resort to federal relief unnecessary by providing deferral state agencies with a limited opportunity to resolve problems of employment discrimination.⁷⁵ As the Supreme Court in *Evans* stated, "[u]nless [633(b)] is to be stripped of all meaning, state agencies must be given at least some opportunity to solve problems of

⁷⁰ Under 29 U.S.C. §§ 626(d)(2) and 633(b) (1976), it is not clear whether the extended filing period is limited to individuals who file charges with deferral-statute authorities. See notes 8 & 11 *supra*. If section 633(b) requires mandatory resort to state proceedings and applies only to those complainants who so comply, then the application of section 626(d)(2) is clarified. Only those complainants who actually resort to state proceedings within the 180-day time period of section 626(d)(1) will be able to obtain the benefits of an extended filing period for federal charges. Absent such resort, complainants should not be allowed to claim qualification for the expanded 300-day filing period under section 626(d)(2).

⁷¹ 441 U.S. 764 (1979).

⁷² See note 52 *supra*.

⁷³ 600 F.2d at 759, 20 FEP Cas. at 536. See 441 U.S. at 764.

⁷⁴ See 616 F.2d at 1220, 22 FEP Cas. at 501. See also *Gabriele v. Chrysler Corp.*, 573 F.2d 949, 955, 17 FEP Cas. 200, 204 (6th Cir. 1978), *vacated in light of Evans*, 442 U.S. 908 (1979).

⁷⁵ See 441 U.S. at 755.

discrimination."⁷⁶ Thus, by removing the incentive to utilize available state remedies as a result of allowing claimants to bypass such remedies and still obtain a time extension to file a federal charge, the *Bean* court has frustrated the purpose behind the two statutory sections.

A second reason why the *Bean* decision is less persuasive than that of *Ciccone* is that the Supreme Court's holding in *Evans*, on which the *Bean* court relied, does not support the statutory interpretation adopted by that court. On the contrary, while *Evans* is, to be sure, less than conclusive on the issue,⁷⁷ it would appear to be consistent with the *Ciccone* court's holding that, in order to qualify for the expanded 300-day filing period under section 626(d)(2), a complainant first must have commenced available state proceedings. To see why this result follows, it is necessary to understand exactly what the Supreme Court held in *Evans*. First, the issue presented in both *Ciccone* and *Bean* did not arise in *Evans* because there, in contrast, the plaintiff had filed his federal charge with the Department of Labor within 180 days of the alleged violation, pursuant to section 626(d)(1), but had failed to commence available state proceedings, under section 633(b), within the applicable state statute of limitations.⁷⁸ The contention in *Evans* was that the plaintiff, under section 633(b), need not commence state proceedings at all.⁷⁹ The Supreme Court rejected this contention, holding that resort to state remedies, whether timely or not, was a prerequisite to maintaining a federal suit under section 633(b).⁸⁰ Therefore, the Court's decision in *Evans* was limited only to the proper construction of section 633(b) and not to that of section 626(d)(2). Indeed, as the *Ciccone* court pointed out, the Supreme Court in *Evans* said nothing to indicate that a deferral-state plaintiff who waited more than 180 days to file either a state or federal charge would nonetheless be entitled to the extended filing period under section 626(d)(2).⁸¹

Second, the *Evans* Court's decision to allow the plaintiff to commence deferral-state proceedings, even if untimely under the state's statute of limitations, by holding the federal court in abeyance,⁸² does not weaken the conclusion that the claimant must first commence deferral-state action. The Court in *Evans* was concerned with the effect of a state statute of limitations on a complainant's access to federal relief.⁸³ Consequently, the Court's holding that the state's limitation period was irrelevant applies only to its conclusion that "state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy."⁸⁴ The *Evans* Court was not deciding the issue of a complainant's right to federal relief when he fails to comply with the federal limitations period under section 626(d)(1)-(2). Viewed in this light, it is almost unthinkable that the Supreme Court in *Evans*

⁷⁶ 441 U.S. at 757.

⁷⁷ See 616 F.2d at 1221, 22 FEP Cas. at 501.

⁷⁸ See 441 U.S. at 754.

⁷⁹ See *id.* at 755.

⁸⁰ *Id.* at 758.

⁸¹ See 616 F.2d at 1221, 22 FEP Cas. at 501.

⁸² See 441 U.S. at 764.

⁸³ See 441 U.S. at 758-59.

⁸⁴ 441 U.S. at 762.

intended to add a judicial gloss to section 626(d)(2) that would have the undesirable effect of benefitting complainants whose claims fortuitously arose in a state which prescribed relief while, at the same time, creating a disincentive for such complaints to utilize these state remedies. Accordingly, in contrast to the *Bean* court, the First Circuit Court of Appeals in *Ciccone* correctly construed section 626(d)(2) by holding that, in order to qualify for the extended filing period under that section, a complainant must commence state proceedings within the 180 day period afforded complainants in nondeferral states under section 626(d)(1).

The split between the *Bean* and the *Ciccone* courts illustrates the difficulty the courts are having in resolving questions of statutory interpretation concerning the time requirements of the ADEA. Without a definitive decision by the Supreme Court on these issues, the present state of confusion is likely to continue. Therefore, attorneys must be particularly attentive to the construction of these time periods adopted by the courts in their respective circuits.

2. *Timely Filing Under Section 2000e-5(e) of Title VII: Chappell v. Emco Machine Works Co.**

Congress has established a number of procedural requirements that a complainant must satisfy before he can gain access to the courts and the EEOC to enforce the provisions of Title VII.¹ One such requirement is that a complainant must file a charge with the EEOC within 180 days of an alleged discriminatory act.² Although the relevant provision of Title VII clearly specifies the length of time within which a complaint must be filed, it otherwise "leaves much to be desired in clarity and precision."³ This is especially true with respect to proper application of the time limit when the complainant has pursued other remedies prior to filing with the EEOC. Courts confronted with this problem of interpreting Title VII's time limits have adopted varying approaches. Some courts adhere strictly to the filing period specified in the

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¹ See 42 U.S.C. § 2000e-5(e) (1976). See generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, ch. 28 (1976 & Supp. 1979).

² See 42 U.S.C. § 2000e-5(e) (1976), which now provides as follows:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place, and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commissioner with the State or local agency.

Id. This section amends 42 U.S.C. § 2000e-5(d) (1970) by extending the filing period from 90 to 180 days.

³ *Cunningham v. Litton Indus.*, 413 F.2d 887, 889, 1 FEP Cas. 861, 862 (9th Cir. 1969).

statute;⁴ others conclude that certain equitable considerations may justify tolling the time period.⁵ Since the time limitation for filing a complaint with the EEOC potentially bars a claimant's access to the remedial processes of the EEOC and ultimately to the courts, a particular court's construction of this provision can have a decisive impact upon the availability of the statutory remedy to victims of discrimination.

During the *Survey* year, in *Chappell v. Emco Machine Works Co.*,⁶ the Court of Appeals for the Fifth Circuit was confronted with the issue of tardy filing following intermediate remedies. In *Chappell*, the court held that the 180-day requirement for filing a charge with the EEOC under section 2000e-5(e) of Title VII is indeed subject to equitable modifications.⁷ Nevertheless, the court found that these exceptions were inapplicable where a plaintiff had detrimentally relied on a state official's⁸ promise to file her EEOC complaint.⁹ Significantly, therefore, although the *Chappell* court was willing to recognize certain equitable exceptions to the time period for filing a charge with the EEOC, the decision in *Chappell* indicates that these exceptions will be narrowly construed.

In *Chappell*, the plaintiff, a female employee of the defendant, the Emco Machine Works Company, alleged that she had been discharged from her job as a result of sex discrimination.¹⁰ After her discharge, she visited the Texas Employment Commission¹¹ to complain about her treatment by the defendant.¹² At that time, one of the Commission's employees promised her that he would promptly file a complaint on her behalf with the EEOC.¹³ For a period of approximately five months thereafter, the plaintiff repeatedly contacted the employee regarding the status of her EEOC complaint and, each time, was assured that the complaint had been filed.¹⁴ Subsequently, the plaintiff hired an attorney who discovered that the EEOC had not received her com-

⁴ See, e.g., *Cutliff v. Greyhound Lines, Inc.*, 558 F.2d 803, 806, 15 FEP Cas. 671, 674 (5th Cir. 1977) (time periods are jurisdictional prerequisites); *Sciaraffa v. Oxford Paper Co.*, 310 F. Supp. 891, 896, 2 FEP Cas. 398, 401 (D. Me. 1970) (time periods are not subject to equitable considerations).

⁵ See, e.g., *Bethel v. Jefferson*, 589 F.2d 631, 641 n.64, 18 FEP Cas. 789, 795 n.64 (D.C. Cir. 1978) (time periods are not jurisdictional prerequisites and are subject to equitable modifications); *Richard v. McDonnell Douglas Corp.*, 469 F.2d 1249, 1252, 5 FEP Cas. 251, 253 (8th Cir. 1972) (time periods may be equitably tolled).

⁶ 601 F.2d 1295, 20 FEP Cas. 1059 (5th Cir. 1979).

⁷ *Id.* at 1301-02, 20 FEP Cas. at 1064.

⁸ The State agency involved was not an officially designated agency pursuant to Title VII. A state fair employment practice agency (FEP) must be formally designated by the EEOC, see 29 C.F.R. § 1601.13 (1979), in order to toll the timely filing requirement by its intervention. The agency must have state or local authorization to administer state or local fair employment practice legislation. See 42 U.S.C. § 2000e-5(c) (1976). For a listing of approved state and local agencies, see 29 C.F.R. § 1601.74 (1979).

⁹ 601 F.2d at 1304, 20 FEP Cas. at 1066.

¹⁰ *Id.* at 1297, 20 FEP Cas. at 1060.

¹¹ Since this agency was not a FEP agency under Title VII, the plaintiff had to comply with the 180-day limitation period of 42 U.S.C. § 2000e-5(e) (1976). See note 2 *supra*.

¹² 601 F.2d at 1304, 20 FEP Cas. at 1066.

¹³ *Id.* at 1296, 20 FEP Cas. at 1060.

¹⁴ *Id.* at 1297, 20 FEP Cas. at 1060.

plaint.¹⁵ More than five months¹⁶ after her initial visit to the Texas Employment Commission, the EEOC received the plaintiff's complaint from the agency.¹⁷ It decided that the complaint was timely filed, processed it and found that Emco had discharged the plaintiff on the basis of sex.¹⁸ After receiving a "right to sue" letter from the EEOC,¹⁹ the plaintiff brought suit in federal district court, alleging that her discharge violated Title VII.²⁰ The district court, however, granted the defendant's motion for summary judgment on the ground that the plaintiff had failed to comply with the timely filing requirement of section 2000e-5(e) of Title VII.²¹

On appeal, the Court of Appeals for the Fifth Circuit affirmed.²² The court specifically rejected the defendant's absolute contention that the 180-day limitations period is a "jurisdictional" prerequisite and, therefore, never subject to equitable tolling.²³ It held instead that equitable considerations, in certain circumstances, can modify the demands of the timely filing requirement of section 2000e-5(e) regardless of certain prior judicial characterizations of that section as "jurisdictional."²⁴ The court noted that modification of such time limits had previously been found justifiable in three distinct situations. First, recent Supreme Court decisions have upheld the tolling of the time period during the pendency of an action mistakenly brought before a state court which had subject matter jurisdiction, but which, under state law, was the wrong forum.²⁵ Second, the Fifth Circuit Court of Appeals previously had allowed the

¹⁵ *Id.*

¹⁶ No reason was given for the delay. Judge Wisdom in his dissent noted that the employee of the Texas Employment Commission stated in an affidavit that his records reflected that the complaint was forwarded to the EEOC on the day of the plaintiff's initial visit to the agency. EEOC records, however, showed the complaint was received some five months later. As Judge Wisdom observed, the fault for the delay "lies with the state agency, the EEOC district office, or the United States mails, in recent years not distinguished for efficiency." 601 F.2d at 1305, 20 FEP Cas. at 1066.

¹⁷ *Id.* at 1304, 20 FEP Cas. at 1066. Under 42 U.S.C. § 2000e-5(c) (1976), the 180-day time period starts to run on the day of the alleged act of discrimination. See note 2 *supra*. This date was August 31, 1973. Because the EEOC did not receive her complaint until March 5, 1974, the plaintiff failed to comply with this requirement by four days.

¹⁸ The EEOC "Determination" contains a finding of timeliness. 601 F.2d at 1306, 20 FEP Cas. at 1067 (Wisdom, J., dissenting). The EEOC generally is very reluctant to find that a charge is untimely filed. See 2 EEOC COMPLIANCE MANUAL §§ 204.3, 208.1 (1976).

¹⁹ This is the notification by the EEOC that conciliation procedures have failed and that the plaintiff may bring a civil action against the employer. See 42 U.S.C. § 2000e-5(f)(1) (1976), amending 42 U.S.C. § 2000e-5(e) (1970).

²⁰ 601 F.2d at 1297, 20 FEP Cas. at 1060.

²¹ *Id.*

²² *Id.* at 1304, 20 FEP Cas. at 1066.

²³ *Id.* at 1301-02, 20 FEP Cas. at 1064. The defendant had argued that since the 180-day limitations period is a jurisdictional prerequisite to a Title VII action, the court was foreclosed, by the plaintiff's untimely filing, from determining whether equitable considerations justified tolling the time period. *Id.*

²⁴ See *id.*

²⁵ See *Electrical, Radio & Machine Workers Local 790 v. Robbins & Myers*, 429 U.S. 229, 137-38 (1976); *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 434-35 (1965); see also *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

In *Robbins*, the Supreme Court held that the statutory period for filing a complaint with

commencement of the 180-day time period to be deferred until the claimant knew or should have known the facts which would give rise to his Title VII claim.²⁶ Third, the Fifth Circuit Court of Appeals also had permitted equitable modification of the time period where the EEOC misleads a complainant about the nature of his Title VII rights.²⁷

After examining these situations, however, the court concluded that the facts of *Chappell* failed to fit into any of the three categories.²⁸ The plaintiff had not filed a lawsuit on her Title VII claim in any court before the expiration of the 180-day period.²⁹ She had not alleged that the period for filing her complaint had elapsed before she became aware of the facts supporting her claim.³⁰ Additionally, she had not contended that the EEOC had misled her concerning her rights under Title VII.³¹ The court declined to extend the tolling principle beyond these situations to cover the plaintiff's case.³² The court reasoned that if

the EEOC was not tolled during the pendency of arbitration procedures. The Court reasoned that Title VII and union grievance procedures were independent remedies and, thus, the statutory period under Title VII continued to run. The Court, however, distinguished *Burnett*, a prior decision that found tolling appropriate, as involving a plaintiff asserting the same statutory claim in a different forum. In *Burnett*, the plaintiff had incorrectly filed a suit in a state court which had jurisdiction over the suit but was the wrong forum under the state's venue law. After dismissal of the suit at the state level, the plaintiff brought suit in federal district court against the same party alleging the same cause of action. The *Burnett* Court held that the filing of the plaintiff's state action was sufficient to toll the statutory period contained in the Employer's Liability Act.

The rationale for this exception to the "jurisdictional" requirement of Title VII, the court of appeals in *Chappell* reasoned, was that the policy of repose inherent in the timely filing requirement was satisfied because the initial state action was filed against the same parties served in the federal action and alleged an identical cause of action. The court of appeals interpreted the *Robbins* Court's recognition of the *Burnett* decision as illustrating one situation where the Supreme Court will allow equitable considerations to toll Title VII's timely filing requirements. 601 F.2d at 1299, 20 FEP Cas. at 1062.

²⁶ See *Bickham v. Miller*, 584 F.2d 736, 738, 18 FEP Cas. 1130, 1131 (5th Cir. 1978) (reaffirming *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931, 11 FEP Cas. 235, 240 (5th Cir. 1975), which had held that commencement of the running of the period should be delayed until a "complainant learns or could be reasonably expected to learn of the discriminatory act." *Id.* at 931, 11 FEP Cas. at 240).

According to the *Chappell* court, the rationale behind this equitable exception to the time period was that it is "unfair to allow a defendant to conceal facts that support the plaintiff's cause of action and then to rely on the statute of limitations to bar the suit when a duly diligent plaintiff was unable to discover those facts." 601 F.2d at 1303, 20 FEP Cas. at 1065 (citation omitted).

²⁷ See *White v. Dallas Independent School Dist.*, 581 F.2d 556, 562, 18 FEP Cas. 204, 208 (5th Cir. 1978) (EEOC letters sent to plaintiff informing her that all time requirements had been met were sufficiently misleading to toll the time period under a state statute of limitations found to be applicable under 42 U.S.C. § 2000e-5(c) (1976)); *Page v. United States Indus., Inc.*, 556 F.2d 346, 351, 15 FEP Cas. 487, 490 (5th Cir. 1978) (although the statutory period commenced to run from date of first letter from EEOC to plaintiff informing her of the right to sue, second letter stating that period commenced on date of receipt of this letter was so misleading as to permit tolling of time period).

²⁸ 601 F.2d at 1303, 20 FEP Cas. at 1065.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* The court stated that, in this regard, the plaintiff's only contention was that she was entitled to rely on the state employee's representations that her EEOC complaint had been filed. *Id.*

³² *Id.*

it found the plaintiff's reliance on the state employee's representations to toll the period:

there would be no logical reason for denying tolling to a person who has relied on a lawyer or a relative or an acquaintance to file his complaint. A holding of this breadth would seriously undermine the policy of repose inherent in the timely filing period, a policy designed to protect employers from stale claims.³³

By placing limitations on the time in which a plaintiff can initiate the remedial process, Congress has spared employers from the prejudicial effects resulting from unfair surprise, faded memories and lost evidence.³⁴ Thus, not wanting to create a situation that ultimately would work to the prejudice of employers, the court affirmed the dismissal of the plaintiff's complaint.³⁵

In contrast, the dissent would have deferred to the EEOC's favorable determination of timeliness.³⁶ Stating that the plaintiff was the victim of a "bureaucratic tangle,"³⁷ the dissent argued that equitable modification of the 180-day period was warranted to advance the broad remedial purposes of Title VII.³⁸ Noting that the plaintiff's reliance on the state employee's assurances was reasonable,³⁹ that there was no real prejudice to the defendant caused by the delay in filing the complaint,⁴⁰ and that the EEOC had found a clear in-

³³ *Id.*

³⁴ See *Johnson v. Railway Express Agency*, 421 U.S. 454, 467-68 n.14 (1975); see also Note, *Limitation Periods for Filing a Charge with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964*, 56 B.U. L. REV. 760, 764 (1976).

³⁵ 601 F.2d at 1304, 20 FEP Cas. at 1066. The court of appeals also found it to be immaterial that the defendant had alleged no prejudice because of the mere four-day delay in filing the complaint. Additionally, the court rejected the plaintiff's argument that her complaint was filed, within the meaning of 42 U.S.C. § 2000e-5(e) (1976), when the state agency received it. Rather, the court held that the complaint must be filed with the EEOC under the statutory scheme. Finally, the court refused to defer to the EEOC's determination that the plaintiff had satisfied the time requirement, and concluded, instead, that the court must make an independent determination of whether jurisdiction exists. If jurisdiction could not be found, the court was without the power to adjudicate the case. 601 F.2d at 1303-04, 20 FEP Cas. at 1065-66.

³⁶ *Id.* at 1306, 20 FEP Cas. at 1067-68.

³⁷ *Id.* at 1304, 20 FEP Cas. at 1066.

³⁸ *Id.* at 1305, 20 FEP Cas. at 1067. The dissent noted that state agencies occupy a special role in the statutory scheme of Title VII. See 42 U.S.C. §§ 2000e-5(c)-5(d) (1976). The dissent found it indefensible to insist on formalistic distinctions between the EEOC and a state agency, such as the Texas Employment Commission, which, while not a FEP agency under Title VII, was created to assist an individual in processing his complaint. 601 F.2d at 1305, 20 FEP Cas. at 1067.

³⁹ *Id.* at 1306, 20 FEP Cas. at 1067-68. The dissent argued that it was reasonable for the plaintiff to suppose that the delay in response was attributable to "the slow turning of bureaucratic wheels." *Id.* 20 FEP Cas. at 1068.

⁴⁰ *Id.* 20 FEP Cas. at 1067. In this regard, the dissent argued that there may even have been no delay in terms of the effect of the statutory time requirement on the defendant. To reach this result, the dissent noted that the statute prescribes a 10-day period in which the EEOC must notify a defendant after a complaint has been filed with its office. See note 2 *supra*. Adding this period to the maximum of the 180-day period, the dissent calculated that the maximum time limitation for these events equaled 190 days. The dissent then reasoned there had been no delay because March 11, 1974, the day on which the defendant received notice from the EEOC, was the 190th day from the date the complaint was filed. 601 F.2d at 1306, 20 FEP Cas. at 1067.

stance of sex discrimination,⁴¹ the dissent would have extended the principle of equitable modification resulting from a situation involving misrepresentations by the EEOC⁴² to cover this case involving similar action by its state counterparts.⁴³

It is submitted that, although the court in *Chappell* correctly concluded that the time limitations of Title VII are subject to equitable tolling, its decision to dismiss the plaintiff's complaint was wrong for several reasons. First, the court's holding in *Chappell* is inconsistent with analogous precedent. In *Dartt v. Shell Oil Co.*,⁴⁴ a case likewise involving a plaintiff's detrimental reliance on the representations of an employee of a federal agency, the Tenth Circuit Court of Appeals permitted equitable tolling of a similar time period under the Age Discrimination Employment Act (ADEA).⁴⁵ In *Dartt*, the plaintiff, suspecting age discrimination as the cause of her discharge, contacted an attorney who referred her to the Federal Wage and Hour Division of the Department of Labor.⁴⁶ The plaintiff met with the director of this federal agency.⁴⁷ The director interviewed the plaintiff and instructed her that his agency would investigate.⁴⁸ When asked how long this investigation would take, he responded that it might take a year.⁴⁹ Although not required to do so by statute, it was the customary practice of the director to advise claimants of the 180-day notice of intent-to-sue requirement.⁵⁰ In this case, however, the director did not so advise the plaintiff.⁵¹ Approximately seven months later, the director informed the plaintiff in writing that there would be some delay in completing the investigation.⁵² For the first time, he discussed the plaintiff's right to sue and the 180-day notice requirement under the ADEA.⁵³ The plaintiff immediately retained a lawyer and brought suit against her employer in federal district court.⁵⁴ The district court dismissed the plaintiff's complaint because of her failure to comply with the 180-day notice limitation of the statute.⁵⁵

On appeal, the Court of Appeals for the Tenth Circuit reversed and held

⁴¹ *Id.*

⁴² See text and note at note 27 *supra*.

⁴³ 601 F.2d at 1305-06, 20 FEP Cas. at 1067-68.

⁴⁴ 539 F.2d 1256, 13 FEP Cas. 12 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977).

⁴⁵ *Id.* at 1262, 13 FEP Cas. at 16. The ADEA, 29 U.S.C. §§ 621-631 (1976), provides in pertinent part:

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days notice of an intent to file such action. Such notice shall be filed

(1) within one hundred and eighty days after the alleged unlawful practice occurred . . .

29 U.S.C. § 626(d) (1976).

⁴⁶ 539 F.2d at 1258, 13 FEP Cas. at 13.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1262, 13 FEP Cas. at 16. See note 45 *supra*.

⁵¹ *Id.*

⁵² *Id.* at 1258, 13 FEP Cas. at 13.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* 13 FEP Cas. at 12.

that, under these circumstances, the time period should be tolled.⁵⁶ Acknowledging that several courts had held the 180-day notice requirement to be "jurisdictional,"⁵⁷ the *Dartt* court nevertheless rejected the defendant's contention that Congress had intended the failure to comply with this requirement to be an absolute bar to bringing an action.⁵⁸ The court reached this conclusion by relying on cases decided by the Court of Appeals for the Fifth Circuit.⁵⁹ These cases had construed limitations of Title VII as analogous to statutes of limitations and, therefore, subject to equitable tolling principles. The *Dartt* court reasoned that the ADEA, like Title VII, was designed to be remedial legislation and was thus entitled to a liberal construction to effectuate the congressional purpose of eliminating employment discrimination.⁶⁰ Because the complainants under the ADEA most likely would be laymen, the *Dartt* court thought they should not be held to strict compliance with the Act's time limitations when reasonably attempting to enforce their statutory rights.⁶¹ Finding that equitable tolling would be consistent with the congressional purposes underlying the ADEA notice requirement⁶² and that the plaintiff had not unreasonably slept on her rights,⁶³ the *Dartt* court granted relief.⁶⁴

The *Chappell* court, however, rejected the plaintiff's reliance on *Dartt*. The court reasoned that a split decision by the Supreme Court on appeal in that case denied *Dartt* any precedential value.⁶⁵ Although admittedly not controlling precedent, the legal reasoning underlying the decision in *Dartt* nevertheless seems equally applicable to the facts of *Chappell*. Like the ADEA, the statutory scheme at issue in *Dartt*, Title VII contemplates that complaints will be initiated with the EEOC by lay persons unfamiliar with the complexities of the administrative procedure.⁶⁶ The court, therefore, should be flexible in appropri-

⁵⁶ *Id.* at 1262, 13 FEP Cas. at 16.

⁵⁷ *See, e.g.,* Ott v. Midland-Ross Corp., 525 F.2d 1367, 1370, 11 FEP Cas. 539, 541 (6th Cir. 1975); Hiscott v. General Elec. Co., 521 F.2d 632, 633-34, 11 FEP Cas. 292, 293 (6th Cir. 1975).

⁵⁸ 539 F.2d at 1259, 13 FEP Cas. at 13-14.

⁵⁹ *See* Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 928, 11 FEP Cas. 235, 238 (5th Cir. 1975); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891-92, 2 FEP Cas. 377, 379 (5th Cir. 1970).

⁶⁰ 539 F.2d at 1260, 13 FEP Cas. at 15.

⁶¹ *Id.* at 1260-61, 13 FEP Cas. at 15.

⁶² *Id.* at 1261, 13 FEP Cas. at 16. The court stated that these purposes were: "(1) To provide the Labor Department with an opportunity to achieve a conciliation of the complaint while it is still fresh, and (2) to give early notice to the employer of a possible lawsuit. . . ." The court found that these purposes had been satisfied despite the tardy filing of notice since the employer was contacted by the agency soon after the plaintiff's initial interview and since the agency had attempted to conciliate the complaint with the employer before it received the plaintiff's notice of intent-to-sue. *Id.* at 1261-62, 13 FEP Cas. at 16.

⁶³ *Id.* at 1262, 13 FEP Cas. at 16. In this regard, the court stated: "We cannot fault [the plaintiff] in her efforts to present her cause. She promptly sought private legal advice and twice promptly followed that advice. *Short of anticipating an administrative dereliction* by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time would void her cause." *Id.* (emphasis supplied).

⁶⁴ *Id.*

⁶⁵ 601 F.2d at 1302 n.6, 20 FEP Cas. at 1064 n.6. This court, however, failed to respond to the plaintiff's argument that the intrinsic reasoning of *Dartt* should be followed.

⁶⁶ *See* Hart v. J. T. Baker Chem. Co., 598 F.2d 829, 832, 19 FEP Cas. 1347, 1349 (3d Cir. 1979).

ate cases when reviewing the failures of aggrieved persons to comply with the procedural technicalities of Title VII. Under this reasoning, since the delay involved was a mere four days, the court in *Chappell* should have granted the plaintiff equitable relief.

The second reason why the court's holding in *Chappell* is incorrect is that such a holding is inconsistent with the congressional purpose of Title VII. As the *Dartt* court recognized, an important factor for determining if a court should exercise its equitable powers to toll a time limitation is whether to do so would be consistent with the congressional purpose of the relevant statute.⁶⁷ It is submitted that *Chappell* was an appropriate case for granting relief under this analysis.

The basic purpose behind the time periods of Title VII is to protect employers from unfairness resulting from a plaintiff's unreasonable delay in filing a complaint.⁶⁸ In *Chappell* there was neither unfairness to the employer nor an instance of unreasonable delay by the plaintiff. The plaintiff's reliance on the assurances of an employee of a state agency, whose customary practice it was to file this type of complaint with the EEOC, was not an example of a plaintiff sleeping on her rights. The complaint was filed a mere four days after the statutory time period had lapsed and this minimal delay resulted in no presumptive or actual prejudice to the defendant.⁶⁹ Therefore, consistent with the congressional purpose behind the time limitations of Title VII, the *Chappell* court could have granted the needed equitable relief to the plaintiff with very little cost either to doctrine or to the defendant.

The third reason why the holding in *Chappell* is incorrect is that the facts of that case involved an appropriate instance of reliance by a plaintiff which could be distinguished easily from inappropriate examples of reliance. The *Chappell* court based its decision to deny equitable relief to the plaintiff, primarily, on its own inability to distinguish appropriate instances of reliance on third party's undertaking to file a complaint on behalf of a claimant. The court was apprehensive about extending the doctrine that equitable considerations can toll Title VII's time periods to inappropriate examples of a plaintiff's reliance on a third party's promise to file a complaint.⁷⁰

It is submitted, however, that the fact situation of *Chappell* clearly involved an appropriate instance of reliance which, consequently, justified an equitable modification of Title VII's time periods. The Texas Employment Commission, although not charged under state law with filing EEOC complaints, was statutorily charged with assisting persons in obtaining relief under the state's unemployment compensation laws.⁷¹ As part of its customary course of business, this state agency routinely filed complaints with the EEOC on behalf of complainants.⁷² Although under no duty originally to assist persons like the plaintiff,

⁶⁷ 539 F.2d at 1261, 13 FEP Cas. at 16.

⁶⁸ See text and note at note 34 *supra*.

⁶⁹ See note 40 *supra*.

⁷⁰ See text at note 33 *supra*.

⁷¹ See 15 TEX. REV. CIV. STAT. ANN., art. 5221 b-9 to -10 (Vernon 1971). In his dissent, Judge Wisdom apparently misconstrued the agency's enabling statute because he concluded that this agency was "charged with assisting claimants in obtaining remedies for employment discrimination. . . ." 601 F.2d at 1305, 20 FEP Cas. at 1067.

⁷² 601 F.2d at 1305, 20 FEP Cas. at 1067 (Wisdom, J., dissenting).

where the agency undertook the duty to file EEOC complaints for grievants, the plaintiff in *Chappell* was entitled to rely on the agency employee's representations that her complaint had been filed promptly.⁷³ The plaintiff's reliance, under these circumstances, clearly is distinguishable from her reliance on a third party who is under absolutely no obligation to file her complaint. Therefore, the plaintiff's reliance in *Chappell* can hardly be considered unreasonable. Accordingly, the court should not have dismissed her complaint.

In conclusion, under the Fifth Circuit Court of Appeals' decision in *Chappell*, a plaintiff's reliance on the representations on an employee of a state agency that his complaint has been filed with the EEOC will not toll the running of the time period under section 2000e-5(e) of Title VII. To reach this result, the Fifth Circuit Court of Appeals has adopted a strict approach to determine when Title VII's time period are subject to equitable modification. Under this narrow approach, even plaintiffs with compelling cases for tolling the 180-day time requirement cannot be assured of the availability of Title VII relief unless the facts of their case fit within one of the three categories outlined by the *Chappell* court.⁷⁴ If other courts adopt this approach in applying the theory of equitable modification to the time requirements of Title VII, the availability of relief under Title VII for instances of employment discrimination will be significantly reduced.

B. Class Actions

1. Notice Under Rule 23(b)(2): *Johnson v. General Motors Corp.**

Rule 23 of the Federal Rules of Civil Procedure governs class actions brought in federal court. Subdivision (b)(2) of this rule authorizes class actions where "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."⁷⁵ Rule 23(b)(2) actions have become common in employment discrimination litigation⁷⁶ brought under Title VII of the Civil Rights Act of 1964.⁷⁷ As a result,

⁷³ An apt analogy is provided by cases which impose tort liability on an insurance company where its agent voluntarily undertakes to promptly obtain an insurance policy for a plaintiff but is negligent in so doing. The rationale of such cases is that the agent has assumed a duty of care toward the plaintiff and that the plaintiff should be entitled to rely on the agent's representations that a policy has been acquired. See, e.g., *United States Fire Ins. Co. v. Cannon*, 349 F.2d 941 (8th Cir. 1965); *Schroeder v. Mauzy*, 16 Cal. App. 443, 118 P.459 (1911); *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1925).

⁷⁴ See text and notes at notes 24-27 *supra*.

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⁷⁵ FED. R. CIV. P. 23(b)(2). Rule 23(b)(2) actions are particularly appropriate in civil rights cases. Advisory Committee Note to FED. R. CIV. P. 23, 39 F.R.D. 98, 102 (1966) [hereinafter cited as Ad. Comm. Note]. Rule 23(b)(2) is not, however, limited to civil rights actions. *Id.*

⁷⁶ See, e.g., *Bolton v. Murray Envelope Corp.*, 553 F.2d 881, 15 FEP Cas. 478 (5th Cir. 1977); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 9 FEP Cas. 211 (3d Cir. 1975); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 7 FEP Cas. 1115 (5th Cir. 1974).

⁷⁷ 42 U.S.C. § 2000e (1976).

the evolution of Title VII law has affected Rule 23(b)(2). For example, Title VII cases which recognize the availability of back pay awards⁴ have led courts to determine that monetary relief, as well as injunctive or declaratory relief, can be awarded in Rule 23(b)(2) actions.⁵

The availability of monetary relief in a Rule 23(b)(2) action has in recent years brought into question the *res judicata* effect of a (b)(2) judgment. Although all members of a (b)(2) class need not be given notice that claims concerning them are being litigated,⁶ Rule 23 provides that the judgment, "whether or not favorable to the class," nevertheless includes them.⁷ Thus, absent class members may be barred from bringing a subsequent action challenging the practices complained of in the original suit. Because of this possible *res judicata* effect of a 23(b)(2) judgment,⁸ several courts have suggested in dictum that, when monetary relief is at stake, absent class members should receive some form of notice before they can be bound by the judgment.⁹ During the *Survey* year, the question arose whether a person who did not receive notice of a 23(b)(2) action for injunctive and declaratory relief could later bring an action for monetary damages springing from the practices at issue in the first suit.

In *Johnson v. General Motors Corp.*,¹⁰ the Court of Appeals for the Fifth Circuit held that, although notice is not necessary to bind absent class members to a 23(b)(2) judgment for injunctive and declaratory relief, due process requires notice before the individual monetary claims of absent class members may be barred.¹¹ The practical effect of *Johnson* will be to encourage the provision of notice in all 23(b)(2) actions in which monetary relief, as well as injunctive and declaratory relief, may be appropriate.

⁴ See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 7 FEP Cas. 627 (5th Cir. 1974).

⁵ See, e.g., *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 9 FEP Cas. 211 (3d Cir. 1975); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 7 FEP Cas. 1115 (5th Cir. 1974).

⁶ Rule 23(d) provides in pertinent part:

In the conduct of actions to which this rule applies, the court *may* make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

FED. R. CIV. P. 23(d)(2) (emphasis added).

⁷ FED. R. CIV. P. 23(c)(3).

⁸ While members of a (b)(2) class action which proceeds to a final judgment may be barred from bringing a later action, this result is not automatic. The Advisory Committee Note to Rule 23 indicates that, although such a judgment will "include" all members, "subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment," and that the *res judicata* effect can be tested only in a subsequent action. Ad. Comm. Note, *supra* note 1, at 106.

⁹ See, e.g., *United States v. Allegheny-Ludlum Ind., Inc.*, 517 F.2d 826, 878, 11 FEP Cas. 167, 208 (5th Cir. 1975); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257, 7 FEP Cas. 1115, 1151 (5th Cir. 1974).

¹⁰ 598 F.2d 432, 20 FEP Cas. 239 (5th Cir. 1979).

¹¹ *Id.* at 433, 20 FEP Cas. at 240. Judge Clark delivered the opinion of the court, joined by Judges Thornberry and Fay. Judge Fay filed a specially concurring opinion. There were no dissents.

The plaintiff in *Johnson*, a black employee at a General Motors Assembly Plant in Georgia, had instituted a Title VII class action in federal district court against his employer.¹² The complaint defined the class as all past, present and future black employees at the plant, and alleged that General Motors discriminated against them in its job advancement practices.¹³ Johnson sought both injunctive and monetary relief.¹⁴ The district court had held that Johnson was a member of the plaintiff class in a prior suit brought by black employees at the same plant, and that his action was barred by the *res judicata* effect of that decision.¹⁵

The prior action, *Rowe v. General Motors Corp.*,¹⁶ had resulted in a final order in favor of members of the plaintiff class, who alleged racial discrimination in the procedures utilized in promoting hourly-paid employees to salaried positions.¹⁷ Although *Rowe* was never formally certified as a class action, it was treated as a 23(b)(2) action.¹⁸ No notice had been given to absent class members in *Rowe*.¹⁹

In appealing the district court's decision in *Johnson*, the plaintiff contended, *inter alia*, that this lack of notice defeated the *res judicata* effect of *Rowe*.²⁰

¹² *Id.* Johnson filed an EEOC complaint against General Motors in 1973. After receiving a right-to-sue letter, he brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (1976) and 42 U.S.C. § 1981 (1976). *Id.*

¹³ *Id.* at 433-34, 20 FEP Cas. at 240. The complaint alleged wide-ranging discrimination in promotion, job assignment, job education and the dissemination of job openings. *Id.*

¹⁴ *Id.* at 433, 20 FEP Cas. at 240.

¹⁵ *Id.* at 434, 20 FEP Cas. at 240.

¹⁶ 457 F.2d 348, 4 FEP Cas. 445 (5th Cir. 1972).

¹⁷ 457 F.2d at 351, 4 FEP Cas. at 446. The trial court determined that the plaintiffs had not been the victims of racial discrimination. The Fifth Circuit reversed, finding that General Motors did in fact discriminate against black employees, and remanded the case. *Id.* at 351, 360, 4 FEP Cas. at 446, 453. On remand, the district court entered a final order requiring General Motors to halt its discriminatory practices. *See Johnson v. General Motors Corp.*, 598 F.2d at 434, 20 FEP Cas. at 240.

¹⁸ 598 F.2d at 434, 20 FEP Cas. at 240-41. *See Rowe v. General Motors Corp.*, 457 F.2d at 359 n.24, 4 FEP Cas. at 452-53 n.24.

¹⁹ 598 F.2d at 436, 20 FEP Cas. at 241.

²⁰ *Id.* at 434, 20 FEP Cas. at 240. Johnson raised several other claims in his attempt to avoid the *res judicata* effect of *Rowe*. The court did not find these claims to be persuasive. First, Johnson argued that the district court's failure to certify *Rowe* as a class action destroyed the *res judicata* effect of the judgment. *Id.* The court answered that failure to comply with subdivision (c)(1) of Rule 23, which requires a court to determine by order whether a class action is to be maintained, was not sufficient to annul the effect of the judgment, since the district court and the Fifth Circuit made it clear that they were treating *Rowe* as a class action. *Id.* at 435, 20 FEP Cas. at 241 (citing *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447, 6 FEP Cas. 677, 681 (5th Cir. 1973)). Second, Johnson argued that the district court's failure to describe the class in the final order, as required in subdivision (c)(3) of Rule 23, destroyed the *res judicata* effect of the judgment. 598 F.2d at 434, 20 FEP Cas. at 240. The court found that this was not a fatal flaw, since the final decree described the class by implication. *Id.* at 435, 20 FEP Cas. at 241. Finally, Johnson alleged that the representation of the plaintiff class in *Rowe* was inadequate because the three named plaintiffs in the suit settled their individual monetary claims for \$1000 each, but failed to pursue money damages for the rest of the class. *Id.* at 434, 20 FEP Cas. at 240. The court found that its holding that Johnson could pursue monetary claims made it unnecessary to rule on this issue. *Id.*

In his specially concurring opinion, Judge Fay agreed that Johnson's claims should not be barred by *Rowe*. He noted that "[i]f writing on a clean slate, I would hold that *Rowe* was never

The Fifth Circuit agreed.²¹ The court acknowledged that Rule 23 does not require notice in 23(b)(2) actions,²² but found that the district court's reliance on this principle in dismissing Johnson's suit was "misplaced."²³ The court remarked that the Advisory Committee's Note to Rule 23 provides that notice, whether mandatory or discretionary, is designed to fulfill the requirements of due process,²⁴ and concluded that "[b]efore the bar of res judicata may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consonant with due process."²⁵

The *Johnson* court's holding was facilitated by its decision in an earlier case, *Bogard v. Cook*.²⁶ The plaintiff in *Bogard* sought damages for injuries arising from unconstitutional practices in a Mississippi prison.²⁷ Bogard had been a member of a class in a prior 23(b)(2) action against the same prison, in which the plaintiff class obtained injunctive and declaratory relief from many of the same practices complained of in *Bogard*.²⁸ Although Bogard had received notice of the prior action, the Fifth Circuit determined that the notice was not adequate because it did not alert class members to the possibility that they could seek individual monetary damages.²⁹ The court therefore held that Bogard's claim was not barred by *res judicata*.³⁰

The *Johnson* court determined that *Bogard* largely controlled the instant action.³¹ The court remarked that, unlike Bogard, Johnson had received no notice of the prior action through which the district court had barred his claims.³² The Fifth Circuit noted that notice and an opportunity to be heard are "fundamental requisites of the constitutional guarantee of procedural due process,"³³ and concluded that due process required that Johnson be allowed to pursue his claims for monetary damages.³⁴ The *Johnson* court further stated

a class action because it was never certified as such." *Id.* at 439, 20 FEP Cas. at 244. Judge Fay was concerned about "the consequences inherent in ignoring the requirements of Rule 23." *Id.* The requirement to which he was referring, FED. R. CIV. P. 23(c)(1), provides:

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

²¹ 598 F.2d at 437, 20 FEP Cas. at 242-43.

²² See text at note 6 *supra*.

²³ 598 F.2d at 436, 20 FEP Cas. at 242.

²⁴ Ad. Comm. Note, *supra* note 1, at 107.

²⁵ 598 F.2d at 436, 20 FEP Cas. at 242.

²⁶ 586 F.2d 399 (5th Cir. 1978).

²⁷ *Id.* at 401.

²⁸ *Id.* at 406-07. The prior action is *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

²⁹ 586 F.2d at 408.

³⁰ *Id.* at 408-09.

³¹ 598 F.2d at 437, 20 FEP Cas. at 424.

³² *Id.*

³³ *Id.* (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974)).

³⁴ 598 F.2d at 437, 20 FEP Cas. at 242-43. The court noted that its decision in *Johnson* raised several issues for the determination of the district court on remand: first, whether Johnson's suit would meet the requirements of Rule 23, and whether Johnson would be an adequate class representative; second, whether Johnson and his class might be entitled to further injunctive and declaratory relief beyond the scope of the *Rowe* judgment; and, third, whether

that its holding "does no violence to the general rule making notice only discretionary in Rule 23(b)(2) cases."³⁵ The court noted that the rule was premised on the notion that 23(b)(2) actions would seek only injunctive or declaratory relief,³⁶ and that in such actions "the due process interests of absent members will usually be safeguarded by adequate representation alone."³⁷ The court determined, however, that recent case law developments made it possible to seek monetary relief in (b)(2) actions as well,³⁸ and that in cases seeking both equitable and monetary relief "the balance swings in favor of the provision of some form of notice."³⁹

As will be demonstrated, the Fifth Circuit's decision in *Johnson* may prove beneficial to the plaintiff class which *Johnson* represents, by allowing members to petition the court for monetary damages. In addition, the court's holding may benefit both plaintiffs and defendants in future actions in the Fifth Circuit and other jurisdictions which adopt *Johnson's* reasoning. Nevertheless, the opinion presents potential disadvantages to both groups. Furthermore, the Fifth Circuit left several important questions unanswered in *Johnson*.

The Fifth Circuit's holding seems appropriate in the factual setting of the case. While the injunctive and declaratory relief awarded in the *Rowe* litigation was designed to benefit the black hourly-paid employees in their future advancement to salaried positions,⁴⁰ it did not afford them an opportunity to peti-

Johnson and other class members might be entitled to relief under the district court's continuing jurisdiction to enforce the *Rowe* decree. 598 F.2d at 438-39, 20 FEP Cas. at 243-44.

³⁵ 598 F.2d at 437, 20 FEP Cas. at 243.

³⁶ *Id.* The court examined the reasoning of two Supreme Court cases which had held notice mandatory in actions brought under Rule 23(b)(3), and determined that these cases explicitly equated monetary relief with (b)(3) actions and injunctive and declaratory relief with (b)(2) actions. *Id.* See *Sosna v. Iowa*, 419 U.S. 393, 397 n.4. (1974) (absence of claim for monetary relief disclosed that a 23(b)(2) action was contemplated; no notice required); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974) (the mandatory notice provision for Rule 23(b)(3) actions "is inapplicable to class actions for injunctive and declaratory relief maintained under subdivision (b)(2).").

³⁷ 598 F.2d at 437, 20 FEP Cas. at 243.

³⁸ *Id.* See, e.g., *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257, 7 FEP Cas. 1115, 1151 (5th Cir. 1974) ((b)(2) actions not limited only to injunctive or declaratory relief; monetary relief should also be available where appropriate); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 251, 9 FEP Cas. 211, 220 (3d Cir. 1975).

³⁹ 598 F.2d at 438, 20 FEP Cas. at 243.

⁴⁰ The decree proposed by the Fifth Circuit when it determined that the *Rowe* plaintiffs were entitled to relief was adopted "virtually verbatim" by the district court in its final decree. 598 F.2d at 435, 20 FEP Cas. at 421. It provided:

It is ordered, adjudged and decreed that the defendant shall continue to take certain affirmative action as hereinafter set forth designated, to implement defendant's policy of equal employment opportunity at its GM Assembly Division Lakewood Plant, Atlanta, Georgia, and to discharge defendant's obligations under law not to discriminate on the basis of race or color in the promotion or transfer of employees.

I.

Defendant shall continue its practice of periodically posting on bulletin boards in conspicuous places throughout its Lakewood plant notices announcing the formation of pre-foreman training classes or other training programs generally designed to equip employees with necessary skills for advancement to supervisory or

tion for monetary damages which may have occurred as a result of past discrimination.⁴¹ The *Johnson* holding that monetary claims would not be barred by the *Rowe* decision provides these employees, as well as those in the broader class defined in *Johnson*,⁴² with such an opportunity.⁴³ For many of these employees, monetary damages may prove to be a far more practical remedy than an injunction promising that they will have greater opportunities for promotions in the future.

Similarly, the provision of notice may benefit plaintiffs in future Title VII cases where back pay is an issue, by informing them of a practical remedy which can supplement injunctive and declaratory relief. In addition, the provision of notice may serve to protect defendant employers from duplicitous litigation, since the *Johnson* court implied that a class member who receives adequate notice but does not pursue a claim will be barred from pursuing an individual claim later.⁴⁴

Although the application of *Johnson* might thus protect plaintiffs and defendants alike, practical and financial problems associated with provision of notice may prove detrimental to both groups. While it may be relatively easy to provide notice to a cohesive plaintiff class like the one in *Johnson*, where all class members work together in a central location, problems may arise in cases in which the plaintiff class is larger and more dispersed. In many civil rights cases, for example, the plaintiff class may be "incapable of specific enumera-

other salaried jobs or to skilled trades work. Such notices shall remain posted for reasonable periods and will set forth information indicating how interested employees can make application for participation in such training programs.

II.

Defendant shall periodically post on bulletin boards in conspicuous places throughout its Lakewood plant notices which shall contain information with respect to the qualifications required for entry level non-supervisory salaried positions and how and where application can be made.

III.

Defendant shall continue its practice that no hourly rate employees and/or applicants for salaried employment at the Lakewood Plant shall be denied review or consideration for salaried employment by the Management Development Committee solely for the reason that they are not supported by the recommendation of their immediate supervisor.

457 F.2d at 360-61, 4 FEP Cas. at 453-54.

⁴¹ The *Rowe* decision indicates that no blacks were hired on the production lines at the General Motors plant at issue in *Rowe* and *Johnson* until 1962, and that promotion and transfer procedures since that time had operated to "freeze" the past discrimination to a significant extent. 457 F.2d at 356, 4 FEP Cas. at 450.

⁴² While the action in *Rowe* was pursued on behalf of hourly-paid black employees. 457 F.2d at 351, 4 FEP Cas. at 446, *Johnson* proposed to represent all black employees at the plant. 598 F.2d at 433, 20 FEP Cas. at 240.

⁴³ This opportunity, however, is contingent on the district court's finding on remand that *Johnson* is an adequate representative for the class. See note 33 *supra*.

⁴⁴ The Fifth Circuit stated: "Before an absent class member may be forever barred from pursuing an individual damage claim, however, due process requires that he receive some form of notice that the class action is pending and that his damage claims may be adjudicated as part of it." 598 F.2d at 438, 20 FEP Cas. at 243 (emphasis added). Thus, the court implied that a class member who does not receive notice but fails to pursue a claim would be "forever barred" from future actions seeking monetary relief from the same defendant for the same practices.

tion."⁴⁵ Thus, it may be difficult to locate members of the class. Moreover, once the class members are located, the party who is required to provide notice may face a substantial, if not prohibitive, financial burden.⁴⁶

Despite the potential difficulty involved in locating and notifying absent class members, *Johnson* nevertheless encourages courts to take a more aggressive role in notification. In ordering notice pursuant to *Johnson*, courts will have to answer mechanical questions, not resolved by *Johnson*, concerning the timing, method, and expense of notice. These questions are similar to those courts now face in actions brought under subdivision (b)(3) of Rule 23,⁴⁷ where notice is mandatory.⁴⁸ Courts first must determine when notice should be given. The *Johnson* court indicated that "[i]n some cases it may be proper to delay notice until a more advanced stage of the litigation; for example, until after class-wide liability is proven."⁴⁹ There may, however, be a due process objection to the timing suggested in *Johnson*, because notice after liability is proved does not give absent members an opportunity to monitor the litigation in order to assure that their rights are being protected by the class representatives.⁵⁰

This due process objection can be answered. Rule 23 provides that a class action may not be maintained unless it is shown that "the representative parties will fairly and adequately protect the interests of the class."⁵¹ Since ade-

⁴⁵ Ad. Comm. Note, *supra* note 1, at 102.

⁴⁶ See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 167 (1974) (cost of providing mail notice to absent class members estimated at \$225,000; postage at that time was \$.06.)

⁴⁷ FED. R. CIV. P. 23(b)(3) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The problems which courts face in providing notice in 23(b)(3) actions are discussed in C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1788 (1972). They include the timing and type of notice, who should bear the financial burden of notice, and whether notice should be prepared and sent by the court or by counsel for the class.

⁴⁸ FED. R. CIV. P. 23(c)(2) provides:

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

⁴⁹ 598 F.2d at 438, 20 FEP Cas. at 243.

⁵⁰ Cf. C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1786, at 140-41 (discussing due process considerations in 23(b)(3) actions).

⁵¹ FED. R. CIV. P. 23(a)(4).

quacy of representation thus will have been determined at the outset of the litigation, it would seem permissible to delay notice until after liability is proved, particularly because monetary claims of individual members of a (b)(2) class are secondary to the collective claim for injunctive or declaratory relief.⁵² After receiving notice, class members may then monitor more closely the portion of the suit relating to monetary relief.⁵³

Once a court determines when notice is to be given, it must determine what type of notice will be adequate. In a 23(b)(2) action, the notice must be "the best . . . practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."⁵⁴ The *Johnson* court indicated that 23(b)(2) notice need not always "be equivalent to that required in (b)(3) actions,"⁵⁵ but it would seem to be in the best interests of both the plaintiff class and the defendant to request that notice be as extensive as possible. Plaintiff class members who could not afford to bring a subsequent action thereby would have an opportunity to litigate their monetary claims as part of an established class, and the defendant would benefit from the reduced possibility of later suits by plaintiff class members who did not receive notice and can afford to bring an action for monetary damages. For the same reasons, although the Supreme Court has held that a class action plaintiff should pay for notice "as part of the ordinary burden of financing his own suit,"⁵⁶ it may be in the interest of the defendant to contribute to the cost in order to facilitate the notification of the greatest number of class members possible.

A final question not resolved in *Johnson* is the *res judicata* effect of a (b)(2) judgment on class members who did receive notice of the litigation but chose not to litigate their monetary claims along with those of the other class members. In an action brought under subdivision (b)(3) of Rule 23, class members may "opt out" of the class in order to bring their own actions later,⁵⁷ but Rule 23 does not contain a similar provision for (b)(2) class members. It is unlikely that such a provision can be implied from the language of Rule 23, from the *Johnson* opinion, or from the policy considerations behind the 23(b)(3) "opt out" provision.

The failure of the authors of Rule 23 to include an "opt out" provision for subdivision 23(b)(2), despite their including a provision for notice in some 23(b)(2) cases,⁵⁸ implies that (b)(2) class members cannot remove themselves

⁵² Ad. Comm. Note, *supra* note 1, at 102. The Note provides that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." *Id.*

⁵³ If there is any doubt as to the adequacy of representation, the court may order notice at an earlier stage under subdivision (d)(2). See text of 23(d)(2) at note 7 *supra*.

⁵⁴ FED. R. CIV. P. 23(c)(2).

⁵⁵ 598 F.2d at 438, 20 FEP Cas. at 243.

⁵⁶ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974). *Eisen* was brought under Rule 23(b)(3), but the Court's holding that the plaintiff must bear the cost of notice did not refer specifically to (b)(3) actions. Rather, the Court stated that the plaintiff must pay for notice "[w]here, as here, the relationship between the parties is truly adversary." *Id.* at 178-79. Thus, where the relationship between the plaintiffs and the defendant(s) in (b)(2) actions is truly adversary, this mandate logically would apply to (b)(2) actions as well as (b)(3) actions.

⁵⁷ FED. R. CIV. P. 23(c)(2)(A) provides that the court will exclude a class member from a (b)(3) class if he so requests.

⁵⁸ See note 6 *supra*.

from the class and bring subsequent individual actions. Moreover, it is unlikely that *Johnson* can be read to sanction an "opt out" provision for 23(b)(2) plaintiffs. By stating that a class member who does receive adequate notice of a pending action may be "forever barred" from pursuing an individual claim,⁵⁹ the *Johnson* court suggests that plaintiffs who seek to exclude themselves from the judgment nevertheless will be bound by it.

Furthermore, the policy behind the "opt out" provision of (b)(3) actions does not apply to members of a (b)(2) class. In a 23(b)(2) action, the interests of class members are not as closely linked as the interests of a 23(b)(2) class. In 23(b)(2) cases, although common questions predominate over questions affecting only individual members, the claims and defenses of individuals similarly situated may differ substantially.⁶⁰ In fact, the individual interests of 23(b)(3) class members may be so strong as to warrant denial of the class action.⁶¹ The ability of 23(b)(3) plaintiffs to exclude themselves from the judgment is designed to protect the strong interest an individual may have in bringing his own claim.⁶² In a (b)(2) action, by contrast, the behavior of the party opposing the class has general application to all class members, and individual claims are secondary to the request for injunctive or declaratory relief.⁶³

Although *Johnson* fails to answer questions regarding the timing, method, financial burden and *res judicata* effect of notice in a (b)(2) action, the decision is sound. Provision of notice reduces the possibility of recurring lawsuits, thus vindicating two class action policy objectives — efficiency, and avoidance of repetitious litigation.⁶⁴ Notice also furthers a third class action policy objective — the establishment of an effective procedure for protecting the rights of persons whose economic position makes it unrealistic for them to maintain separate suits.⁶⁵ *Johnson* will ensure that more potential plaintiffs are informed about suits which may affect their rights, and in addition will provide them

⁵⁹ See text at note 44 *supra*.

⁶⁰ See generally Ad. Comm. Note, *supra* note 1, at 103. For example, the Committee noted that:

[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determinations of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds of degrees of reliance by the persons to whom they were addressed.

Id. (citations omitted).

⁶¹ Ad. Comm. Note, *supra* note 1, at 104-05.

⁶² *Id.* at 105.

⁶³ *Id.* at 102.

⁶⁴ The objectives of a class action are three-fold:

[1] The efficient resolution of the claims or liabilities of many individuals in a single action, [2] the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and [3] the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits.

C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1754 (1972).

⁶⁵ *Id.*

with a practical monetary remedy to coincide with equitable relief. The unanswered questions in *Johnson* must be resolved by reference to these policy objectives, as well as to the principle on which the decision was based — that notice and an opportunity to be heard are fundamental requirements of due process.⁶⁶

2. *Rule 23 Requirements and § 706 of Title VII: EEOC v. General Telephone Co. of Northwest**

Section 706 of Title VII in the original Civil Rights Act of 1964 gives individuals the right to bring employment discrimination suits in their own behalf.¹ In addition, this section has been construed by the courts as authorizing class action suits.² The 1972 amendments³ to Title VII⁴ empowered the EEOC also to bring suit under 706(f)(1) on behalf of an aggrieved individual.⁵ It is well established that class action suits brought by individuals under section 706 must comply with the class action requirement of Rule 23 of the Federal Rules of Civil Procedure.⁶ Nevertheless, it is not clear whether the EEOC,

⁶⁶ 598 F.2d at 437, 20 FEP Cas. at 242.

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¹ 42 U.S.C. § 2000e-5(f)(1) (1976). See note 5 *infra*.

² See, e.g., *Otis v. Crown Zellerbach Co.*, 398 F.2d 496, 499, 1 FEP Cas. 328, 330 (5th Cir. 1968).

³ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

⁴ 42 U.S.C. § 2000e-17 (1976).

⁵ 42 U.S.C. § 2000e-5(f)(1) (1976). This section provides in pertinent part:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a governmental agency, or political subdivision.

⁶ See, e.g., *Wofford v. Safeway Stores*, 78 F.R.D. 460, 473, 18 FEP Cas. 1645, 1654 (N.D. Cal. 1978); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 268, 11 FEP Cas. 449, 452 (10th Cir. 1975).

Rule 23(a) provides four prerequisites which must be met before members of a class may sue or be sued as representative parties: 1) the class is so numerous that joinder of all members is impractical; 2) there are questions of law or fact common to all members; 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. Having met these prerequisites, a class must come within one of the three categories of 23(b): 1) where separate adjudication would create a risk of establishing inconsistent standards of conduct for the party opposing the class or would effectively adjudicate the claims of other class members not parties to the action; 2) where the party opposing the class has acted or refused to act on grounds

when it brings a class action suit under section 706, must also comply with Rule 23.

Complicating the question of whether the EEOC must comply with Rule 23 when bringing a class action under section 706 is the fact that the EEOC has not been required to comply with Rule 23 when bringing a "pattern or practice" class action under section 707.⁷ A "pattern or practice" suit under section 707 is a suit brought against a private employer when the discrimination consists of more than an isolated incident.⁸ As a result of the amendments to Title VII and decisional law, there is no longer any essential difference between sections 706 and 707 when the EEOC is the plaintiff — the EEOC may bring a class action under either section and may seek both injunctive and affirmative relief in the form of back pay and retroactive seniority.⁹ Thus, while compliance with Rule 23 is not required of the EEOC under section 707, the issue with respect to section 706 is still unresolved.

Although a number of district courts have considered the issue and have held that the EEOC need not comply with Rule 23 in bringing a class action under section 706,¹⁰ the Fifth Circuit Court of Appeals, in *EEOC v. D.H. Holmes Co.*,¹¹ was the first appellate court to address the issue. The *Holmes* court held that the EEOC is not exempt from the applicability of Rule 23 and must meet its requirements in order to maintain a class action under section 706.¹²

generally applicable to the class as a whole; or 3) where common questions of fact or law predominate over individual questions and a class action is superior to other available methods of adjudicating the controversy. This procedure, known as certification, must be undertaken before an action may proceed as a class action. *See, e.g.,* *Branham v. Electric Co.*, 63 F.R.D. 667 (D. Tenn. 1974). Where the requirements of Rule 23 have not been met, courts have refused to allow actions to be certified as class actions. *See, e.g.,* *Vann Allen v. Circle K Corp.*, 58 F.R.D. 562, 565 (C.D. Cal. 1972); *White v. Gates Rubber Co.*, 53 F.R.D. 412 (D. Colo. 1971). The plaintiff bears the burden of proving compliance with the requirements. 3B MOORE'S FEDERAL PRACTICE ¶ 23.02 n.33 (2d ed. 1977).

⁷ *See, e.g.,* *EEOC v. Stroh Brewery Co.*, 19 FEP Cas. 1099, 1105-06 (E.D. Mich. 1979). The United States Attorney General Section 707, 42 U.S.C. § 2000e-6(a) (1976), provides in pertinent part:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States. . . .

This authority was given the EEOC by the 1972 amendments. *See* 42 U.S.C. § 2000e-6(c) (1976). Prior to the 1972 amendments, the Attorney General was also not required to comply with Rule 23 when bringing an enforcement action under § 707. *See, e.g.,* *United States v. T.I.M.E.*, D.C., 517 F.2d 294, 11 FEP Cas. 66 (5th Cir. 1975).

⁸ 42 U.S.C. § 2000e-6(a) (1976).

⁹ *EEOC v. General Tel. Co.*, 16 FEP Cas. 477, 478 (W.D. Wash. 1977). *See also* 118 CONG. REC. 4081-82 (1972) (remarks of Senators Williams and Javits).

¹⁰ *See, e.g.,* *EEOC v. CTS of Asheville, Inc.*, 13 FEP Cas. 852, 853 (W.D.N.C. 1976); *EEOC v. Vinnell-Dravo-Lockheed-Mannix*, 417 F. Supp. 575, 577, 12 FEP Cas. 1815, 1816 (E.D. Wash. 1976); *EEOC v. Rexene Polymers Co.*, 10 FEP Cas. 61 (W.D. Tex. 1975); *EEOC v. Lutheran Hosp.*, 10 FEP Cas. 1177, 1178 (E.D. Mo. 1974); *EEOC v. Mobil Oil Corp.*, 6 FEP Cas. 727, 707 (W.D. Mo. 1973). *Contra*, *EEOC v. Datapoint Corp.*, 12 FEP Cas. 1133, 1134 (W.D. Tex. 1976).

¹¹ 556 F.2d 787, 15 FEP Cas. 378 (5th Cir. 1977), *cert. denied*, 438 U.S. 265 (1977).

¹² *Id.* at 789, 15 FEP Cas. at 378.

The court observed that the 1972 amendment, which enabled the EEOC to bring suit, in no way altered either class action procedures or the post-1964 case law which held private suits under section 706 appropriate for class litigation under Rule 23.¹³ Moreover, the court observed that the express statutory language of section 706 merely grants the EEOC standing to sue to the same extent as individuals.¹⁴ Finding, therefore, no congressional intent to exempt the EEOC,¹⁵ the court reasoned that when the EEOC brings suit, it does so subject to Rule 23, just as does the private litigant in whose place it stands.¹⁶ In support of its conclusion, the court noted that the important interests served by the rule — preventing piecemeal suits, permitting widescale relief, protecting a defendant from inconsistent adjudications, and providing for judicial control of possible abuse of the class action device¹⁷ — militate against granting EEOC an exemption.¹⁸ The *Holmes* court also suggested that if, for any reason, the EEOC was not certified at the trial court level, its recourse was to bring a “pattern or practice” action under section 707 against the Holmes company while at the same time it continued to seek relief for the five named individuals in the instant action under section 706.¹⁹

During this *Survey* year, the Ninth Circuit Court of Appeals in *EEOC v. General Telephone Co. of Northwest*²⁰ held, contrary to the *Holmes* court decision, that the EEOC is not required to comply with Rule 23 class action requirements when it seeks relief for a class of individuals under section 706.²¹ As a result, a split now exists between two circuits on whether the EEOC must meet the class certification requirements of Rule 23 when it brings a class action under section 706.

In *General Telephone*, the EEOC instituted an action against General Telephone of Northwest, its subsidiary, and a union (hereinafter collectively referred to as “General Telephone”), alleging discrimination against women employees with respect to maternity leave, access to craft jobs, and opportunities for promotion to managerial positions.²² It sought both injunctive relief and back pay.²³ The EEOC then moved for an order bifurcating the issues of class liability and individual damages.²⁴ Thereafter, the district court referred

¹³ *Id.* at 794, 15 FEP Cas. at 384.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 795, 15 FEP Cas. at 385.

¹⁷ *Id.*

¹⁸ *Id.* 15 FEP Cas. at 384. The *Holmes* court also found that because Congress had granted the EEOC explicit statutory standing to sue, the EEOC is a member of the class for the purposes of Rule 23. *Id.* at 796, 15 FEP Cas. at 386. See note 6 *supra*. The court also stated its belief that in the typical situation the EEOC would be an excellent class representative since it possesses the resources, experience, and tenacity to serve the class' interests adequately. *Id.* at 797, 15 FEP Cas. at 386. See note 6 *supra*. The court conceded, however, that a possible conflict might arise between the EEOC's public purpose and the private interests in the case and noted that this was a question of fact to be resolved at the trial level. *Id.*

¹⁹ *Id.* at 792 n.8, 15 FEP Cas. at 382 n.8.

²⁰ 599 F.2d 322, 20 FEP Cas. 52 (9th Cir. 1979).

²¹ *Id.* at 334, 20 FEP Cas. at 59-60.

²² *Id.* at 325, 15 FEP Cas. at 53.

²³ *Id.*

²⁴ *Id.* EEOC's motion was pursuant to FED. R. CIV. P. 42(b).

the action to a magistrate for trial.²⁵ General Telephone followed with a motion to dismiss the class action aspects of the complaint.²⁶ In his report to the district court, the magistrate recommended that General Telephone's motion to dismiss be denied and that the EEOC not be required to comply with Rule 23.²⁷ The magistrate based his recommendation on three reasons: first, the EEOC is not required to comply with Rule 23 in section 707 "pattern or practice" suits and suits under section 706 should not be treated differently; second, the statute itself provides the necessary authority for the EEOC to bring a class action; and finally, it is undesirable and impractical to require the EEOC to comply with Rule 23.²⁸ The district court adopted the magistrate's recommendations and entered an order denying the motion.²⁹ Later, that order was amended to certify the question for interlocutory appeal.³⁰

On appeal, General Telephone argued that neither the Civil Rights Act of 1964 nor the Federal Rules of Civil Procedure exempts the EEOC from compliance with Rule 23 when it brings a class action under section 706.³¹ The court, reviewing the legislative history of the 1972 amendments, the language of the statute, and the Federal Rules of Civil Procedure, conceded that they failed to express clearly a congressional intention that the EEOC either comply with or be exempt from the Rule 23 class action certification requirement.³² The court found, however, that the two requirements essential to maintenance of a class action are that a class exists and that the named representative is a member of the class he purports to represent.³³ Because of its determination that the EEOC meets these two prerequisites, the court concluded that the EEOC should not be required to comply with Rule 23.³⁴ As to the first prerequisite, the court stated that every action under Title VII is, in effect, a class action.³⁵ The court acknowledged that the second prerequisite, membership in a class, posed a greater problem since the EEOC was obviously not a member of the class.³⁶ The court reasoned, however, that while class action certification requires a judicial determination that the named plaintiff will adequately

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* The magistrate concluded that to require compliance would be undesirable and impractical because EEOC could never comply with Rule 23 because it is not a member of the class it seeks to represent and could not adequately represent the class' interests and because to require compliance would hinder congressional intent to broaden the EEOC's enforcement powers. *EEOC v. General Tel. Co.*, 16 FEP Cas. 476, 479-80 (W.D. Wash. 1977).

²⁹ *Id.* at 326, 20 FEP Cas. at 53.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 328, 20 FEP Cas. at 55.

³³ *Id.* at 327-28, 20 FEP Cas. at 54-55.

³⁴ *Id.* at 333, 20 FEP Cas. at 59.

³⁵ *Id.* at 327, 20 FEP Cas. at 54. Courts repeatedly have asserted that discrimination on the basis of race or national origin is by definition a class wrong, *see, e.g.*, *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1333, 14 FEP Cas. 995, 997 (9th Cir. 1977); *Rodriguez v. East Tex. Motor Freight*, 505 F.2d 40, 50, 8 FEP Cas. 1246, 1253 (5th Cir. 1974), *rev'd on other grounds*, 431 U.S. 395 (1977); *Otis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499, 1 FEP Cas. 328, 330 (5th Cir. 1968), presumably because some characteristic common to each group member is the basis for the different treatment.

³⁶ 599 F.2d at 328, 20 FEP Cas. at 55.

represent the class, the EEOC had received a legislative determination that it was an adequate representative of the class when Congress granted it standing to sue.³⁷ In short, the court concluded that because Congress had made the determination that the EEOC is a "properly suing party" and an adequate representative of the class,³⁸ the essentials of Rule 23 had been satisfied and Rule 23 certification is unnecessary.³⁹

In arriving at its decision, the *General Telephone* court explicitly rejected the *Holmes* court's decision because that decision failed to recognize the distinction between a private class action suit which must comply with Rule 23 and a suit by the EEOC.⁴⁰ According to the *General Telephone* court, that distinction rests in the EEOC's being charged with the vindication of public rights and policy and not merely with the enforcement of private rights.⁴¹ The court also based its decision on the similarities between actions under section 706 and section 707. Conceding that there may be differences in the nature and burden of proof in EEOC actions as between these sections, the *General Telephone* court reasoned that nonetheless in both cases the EEOC seeks to vindicate a public policy and in both may obtain individual relief.⁴² The court endorsed the district court's conclusion that since the Attorney General, who prior to the 1972 amendments had been charged with bringing actions under section 707, had never been required to comply with Rule 23, it was illogical to apply a different requirement to actions under section 706 in view of the identical nature of the two suits.⁴³

Finally, the *General Telephone* court addressed the issue of the procedural safeguards available to protect defendants if the EEOC was not required to comply with Rule 23. Rule 23 operates to protect defendants from multiple litigation on the same issue, double damage payments, and inconsistent adjudication. Recognizing the need for safeguards if the EEOC was exempted from Rule 23, the court stated that because the federal courts are vested with broad equitable powers under Title VII, they can prescribe procedures and remedies which are fair to all parties and which insure that defendants are not subjected to unnecessary duplicative adjudication or double payments.⁴⁴ Therefore, the court concluded that defendants would be protected even though Rule 23 certification was not required.

It is submitted that the holding of the *General Telephone* case is correct but that the reasoning on which it relied is questionable.

In part, the court based its decision that the EEOC need not comply with Rule 23 in section 706 class actions on its conclusion that EEOC satisfied the two essential prerequisites to a class action and therefore need not comply with Rule 23. It might be observed initially that the logic of this reasoning is not readily discernable. It is difficult to understand why the conclusion that EEOC

³⁷ *Id.*

³⁸ *Id.* at 333, 20 FEP Cas. at 59.

³⁹ *Id.*

⁴⁰ *Id.* at 331, 20 FEP Cas. at 57.

⁴¹ *Id.*

⁴² *Id.* at 333, 20 FEP Cas. at 58-59; *EEOC v. General Tel. Co.*, 16 FEP Cas. 476, 478 (W.D. Wash. 1977).

⁴³ 599 F.2d at 331, 20 FEP Cas. at 57.

⁴⁴ *Id.* at 334-35, 20 FEP Cas. at 60.

need not comply with Rule 23 follows from the assertion that the EEOC satisfies the essentials of that rule. Beyond this fundamental question, however, the court's determination that the EEOC meets the prerequisite that the representative party adequately represent the class is not well-founded. Courts repeatedly have held that private litigants are not bound by previously litigated government suits.⁴⁵ The rationale for this line of authority is that the government and the members of the class it purports to represent often pursue different and potentially conflicting interests.⁴⁶ As one court noted in a case involving a suit previously litigated by the EEOC: "While the government may be willing to compromise in order to gain prompt, and perhaps nationwide relief, private plaintiffs, more concerned with full compensation . . . may be willing to hold out for full restitution."⁴⁷ Thus, the *General Telephone* court's determination that the EEOC can adequately represent the interests of class members is contrary to the reasoning of well-accepted authority and was made without citation to decisional law or legislative history in the opinion. Assuming, therefore, that the court's determination was erroneous, then, necessarily, its conclusion that the EEOC satisfies the basics of Rule 23 must also fail. Thus, that Rule 23 is essentially satisfied when the EEOC brings a class action suit, a factor on which the court relied in reaching its holding, in fact, provides little, if any, support for it.

In addition to its conclusion that the EEOC satisfied Rule 23, the *General Telephone* court relied on the availability of section 707 as an alternative to section 706. With respect to its reliance on this factor, the reasoning of the *General Telephone* court was correct. Because both injunctive relief and back pay are available under either section,⁴⁸ there appears to be little reason to require compliance with Rule 23 in class actions under section 706 when such compliance is not required under section 707. The *Holmes* court, for example, apparently did not recognize the anomaly created by its decision when it suggested that the EEOC could bring a class action against Holmes under section 707 if in the lower court the EEOC was unable for any reason to qualify as a class representative in the lower court.⁴⁹ Thus; that section 707 provides a ready alternative to section 706, a fact on which the court relied, does provide support for the *General Telephone* holding.

In addition to the availability of section 707, however, there is a more compelling reason for not requiring the EEOC to comply with Rule 23 in ac-

⁴⁵ *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 837, 11 FEP Cas. 167, 175-76 (5th Cir. 1975); *Rodriguez v. East Tex. Motor Freight*, 505 F.2d 40, 65, 8 FEP Cas. 1246, 1265 (5th Cir. 1974), *rev'd on other grounds*, 431 U.S. 395 (1977); *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 51 (5th Cir. 1974), *cert. denied*, 419 U.S. 100 (1975); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1203, 5 FEP Cas. 204, 205 (2d Cir. 1972); *United States v. Operating Engineers*, 4 FEP Cas. 1088, 1093 (N.D. Cal. 1972).

⁴⁶ *See, e.g.*, *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 843, 11 FEP Cas. 167, 179 (5th Cir. 1975); *United States v. T.I.M.E. - D.C.*, 516 F.2d 299, 399 n.36, 11 FEP Cas. 66, 80 n.36 (5th Cir. 1975), *rev'd on other grounds*, 431 U.S. 395 (1977).

⁴⁷ *Rodriguez v. East Tex. Motor Freight*, 505 F.2d 40, 66, 8 FEP Cas. 1246, 1266 (5th Cir. 1974), *rev'd on other grounds*, 431 U.S. 395 (1977).

⁴⁸ *EEOC v. Singer Controls Co.*, 80 F.R.D. 76, 78, 18 FEP Cas. 309, 311 (N.D. Ohio 1978).

⁴⁹ 556 F.2d at 792 n.8, 15 FEP Cas. at 382 n.8.

tions under section 706 which the *General Telephone* court did not consider. A judgment under Rule 23(b) generally binds all members of the class, even those not before the court, thereby barring duplicative actions and piecemeal suits. As noted above, however, courts have held consistently that private litigants are not bound by previously litigated government suits.⁵⁰ In light of this authority, to require the EEOC to satisfy Rule 23 in section 706 class actions would have as a consequence increased expense, delay and judicial diseconomy with no apparent countervailing benefit such as avoidance of duplicative litigation or inconsistent adjudications.

The holding in *General Telephone*, despite the reasoning on which it rests, represents the better resolution of the question of whether the EEOC must comply with Rule 23 when it brings a section 706 class action. Given the authority that a governmental entity cannot adequately represent the private interests of a class, EEOC would seem to be disabled, perhaps as a matter of law, from ever satisfying Rule 23. Even if such compliance were possible, as long as private litigants are not bound by judgments in government-litigated suits, the safeguards of barring duplicative suits and inconsistent adjudications which Rule 23 provides are unavailable. To require the expenditure of time, money and the other resources involved in a certification process under these circumstances makes little sense. The availability of section 707 underscores this conclusion. For these reasons, the *General Telephone* holding that the EEOC need not meet the Rule 23 certification requirement when it brings a class action under section 706 represents the better view.

C. *Jury Trials in ADEA Actions: Nakshian v. Claytor**

In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA),¹ which provided aggrieved employees with a right of action against private sector employers.² Federal employees were not granted a cause of action against the Government until the Act was amended in 1974.³ A controversy currently exists concerning a federal employee's right to a jury trial in ADEA actions. Initially, the jury trial question arose in the context of private sector suits, and the Supreme Court held that private employees were entitled to jury trials.⁴ In an almost simultaneous indication of its own attitude, Congress amended the ADEA in 1978 to provide explicitly for jury trials in private

⁵⁰ See cases cited at note 44 *supra*. It should be noted that following this authority, even where the EEOC required to comply with Rule 23 under section 707, private litigants would still not be bound by judgments obtained by the EEOC. For this reason, the availability of section 707 as an alternative to section 706 provides only secondary support for the *General Telephone* holding.

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¹ 29 U.S.C. §§ 621-634 (1976). Enacted in 1967, the ADEA makes it unlawful for any employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual" because of such individual's age. 29 U.S.C. § 623(a)(1) (1976). The Act applies to workers between the ages of 40 and 70. *Id.* at § 631(a) (Supp. II 1978).

² 29 U.S.C. §§ 626(c), 630(b) (1976).

³ 29 U.S.C. § 633a (1976).

⁴ See *Lorillard v. Pons*, 434 U.S. 575 (1978).

sector suits.⁵ Congress, however, did not specifically extend that right to public sector employees. During the *Survey* year, the question of a federal employee's right to a jury trial in an ADEA action was presented to the courts.

In *Nakshian v. Claytor*,⁶ the Court of Appeals for the District of Columbia Circuit held that an employee who brings an ADEA action against the federal government may demand a jury trial.⁷ The D.C. Circuit's approval of jury trials for federal employees in the nation's capital seems likely to lead to a significant number of cases in other circuits in which federal employees will request jury trials in ADEA actions. Moreover, the decision may prompt Congress to make an explicit statement approving or disapproving jury trials in such actions.

The plaintiff in *Nakshian* was a 62-year-old civilian employee of the United States Department of the Navy.⁸ She brought an action in the district court under section 15(c) of the ADEA,⁹ charging the Navy with age discrimination in violation of the Act.¹⁰ She requested a jury trial, and the Government moved to strike the request on the grounds that Congress did not specifically authorize jury trials in ADEA actions against the federal government.¹¹ In a memorandum opinion, the district court denied the Government's motion, and the Government filed an interlocutory appeal.¹²

The D.C. Circuit's discussion of the issue on appeal centered on the Government's contention that jury trials are barred by the doctrine of sovereign immunity. The Government argued that the seventh amendment's guarantee of a right to jury trial in suits at "common law"¹³ does not apply to suits against the Government, which were prohibited at common law.¹⁴ While acknowledging that Congress may waive sovereign immunity, the Government noted that Congress also may specify the terms and conditions under which suits against the federal government may be maintained.¹⁵ Thus, the Govern-

⁵ 29 U.S.C. § 626(c) (Supp. II 1978).

⁶ 628 F.2d 59 (D.C. Cir. 1980).

⁷ *Id.* at 65. Chief Judge Wright, joined by Judge Bazelon, delivered the opinion. Judge Tamm filed a dissent.

⁸ *Id.* at 60.

⁹ Section 15(c) of the ADEA provides:
29 U.S.C. § 33a(c) (1976).

¹⁰ 628 F.2d at 60.

¹¹ *Id.*

¹² *Id.* 28 U.S.C. § 1292(b) (1976) provides that a Court of Appeals may permit an appeal to be taken from an interlocutory order which involves a "controlling question of law as to which there is substantial ground for difference of opinion. . . ." This is authorized when "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*

¹³ The seventh amendment provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

¹⁴ 628 F.2d at 60.

¹⁵ *Id.*

ment reasoned that the grant of a right to a jury trial, like a waiver of sovereign immunity, "cannot be implied but must be unequivocally expressed."¹⁶ The Government concluded that, since it could find no such authorization in the ADEA or in its legislative history, the plaintiff was not entitled to a jury trial.¹⁷

The appellee contended, and the D.C. Circuit agreed, that it is not necessary to find an explicit grant of a right to a jury trial.¹⁸ The court found that the Government and the dissent erroneously construed the doctrine of sovereign immunity to include a presumption against jury trials in suits against the federal government, even where the Government has otherwise waived its immunity from suit.¹⁹ The court determined that, "once Congress has waived the Government's immunity, and where it has not explicitly specified the trial procedure to be followed, sovereign immunity drops out of the picture."²⁰

Having thus determined that a waiver of sovereign immunity does not in itself indicate a preference for or against jury trials, the court reasoned that the jury trial issue is one of ordinary statutory interpretation.²¹ The court therefore examined the language and legislative history of the ADEA, as well as relevant case law, to determine whether the statute "*expressly or by fair implication*" provides for trial by jury for federal employees.²²

The court found three indications that Congress intended federal employees in ADEA actions to be entitled to jury trials. The first two indications were found in the language of ADEA section 15(c),²³ which governs jurisdiction and relief for federal government employees. First, the court reasoned that "the very fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims supports the inference" that jury trials are to be permitted.²⁴ The court noted that a grant of jurisdiction to a district court carries with it a right to trial by jury, absent a specific provision as to method of trial.²⁵ The D.C. Circuit determined

¹⁶ *Id.* at 61 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

¹⁷ 628 F.2d at 61.

¹⁸ *Id.* at 61, 62-63.

¹⁹ *Id.* at 63 n.4.

²⁰ *Id.*

²¹ *Id.* at 63.

²² *Id.* (quoting 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2314, at 69 (1971) (emphasis added by the court)). The court noted that:

Courts can, and do, infer a congressional intention to allow jury trials in actions against the Government in the absence of explicit statutory authorization. For example, in *United States v. Pfisch*, . . . 256 U.S. 547 [(1921)], the Supreme Court concluded that actions brought against the Government under the Lever Act of 1917, 40 Stat. 276 (1917), may be tried to a jury even though the statute did not provide for jury trials.

628 F.2d at 63.

²³ 29 U.S.C. § 633a(c) (1976).

²⁴ 628 F.2d at 63. Section 15(c) provides in pertinent part that an aggrieved employee may bring an action "in any Federal district court of competent jurisdiction. . . ." 29 U.S.C. § 633a(c) (1976).

²⁵ 628 F.2d at 63-64 (quoting 5 MOORE'S, *FEDERAL PRACTICE* ¶ 38.31[2] at 236 (2d ed. 1980)).

that two Supreme Court decisions, *United States v. Pfitsch*²⁶ and *Law v. United States*,²⁷ had relied on this reasoning in concluding that actions against the federal government could be tried before a jury.²⁸

The court found the second indication of congressional intent to provide for jury trials in the use of the term "legal relief" in section 15(c).²⁹ The court pointed out that the same language was used in section 7(c) of the ADEA, which governs suits against private employers.³⁰ It noted that, before section 7(c) was amended in 1978 to provide explicitly for jury trials for private employees,³¹ the Supreme Court in *Lorillard v. Pons*³² had held that the term "legal relief" indicated congressional intent to provide for jury trials.³³ Thus, the court concluded that, by using the term of art "legal relief" in section 15(c), Congress had "exercis[ed] its power to place such suits within the class of suits to which the Seventh Amendment jury trial guarantee applies."³⁴

The court found the third indication of congressional intent to provide for jury trials in the legislative history of the 1978 ADEA amendments. The Government contended that, had Congress intended to authorize jury trials in section 15(c) actions, it would have amended that section when it amended section 7(c) in 1978.³⁵ The court, however, examined the legislative history of the 1978 amendment, and concluded that "Congress was merely acting to reaffirm its intention to provide for jury trial whenever the issue was in doubt."³⁶ The court noted that Senator Edward Kennedy, who proposed the amendment before the Supreme Court's decision in *Lorillard*, did so because of a conflict on the jury trial issue in several courts of appeals,³⁷ and that the discussion of the amendment centered on the propriety of jury trials in age discrimination cases, without distinguishing between public and private employers.³⁸

²⁶ 256 U.S. 547 (1921) (Supreme Court assumed that district court jurisdiction implies jury trials).

²⁷ 266 U.S. 494 (1925) (cases under War Risk Insurance Act may be tried before a jury).

²⁸ 628 F.2d at 64.

²⁹ *Id.* Section 15(c) provides in pertinent part that government employees may bring actions for "legal or equitable relief." 29 U.S.C. § 633a(c) (1976).

³⁰ 628 F.2d at 64. Section 7(c) of the ADEA provides in pertinent part: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 626(c)(1) (1976).

³¹ Section 7(c)(2) of the ADEA provides:

In any action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C. § 626(c)(2) (Supp. II 1978).

³² 434 U.S. 575 (1978).

³³ 628 F.2d at 64. *See Lorillard v. Pons*, 434 U.S. at 585.

³⁴ 628 F.2d at 64.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See, e.g.,* *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977) (right to jury trial in ADEA actions against private employers), *cert. denied*, 434 U.S. 1022 (1978); *Pons v. Lorillard*, 549 F.2d 950 (4th Cir. 1977) (right to jury trial), *aff'd*, 434 U.S. 575 (1978); *Morelock v. NCR Corp.*, 546 F.2d 682 (6th Cir. 1978) (no right to jury trial), *vacated and remanded*, 435 U.S. 911 (1978).

³⁸ 628 F.2d at 65.

Based on these three indications of congressional intent — district court jurisdiction, the use of the term “legal relief,” and legislative history — the *Nakshian* court concluded that the plaintiff was entitled to a jury trial in her ADEA action against the Navy.

In the *Nakshian* dissent, Judge Tamm adopted the Government’s argument that sovereign immunity includes immunity from jury trials as well as immunity from suits.³⁹ In addition, he took issue with each point of statutory construction raised by the majority in support of jury trials for federal employees bringing ADEA actions.

Judge Tamm determined that section 15(c)’s grant of exclusive jurisdiction in federal district court did not support the majority’s holding, and that the majority’s reliance on *United States v. Pfitsch*⁴⁰ on this issue was “unavailing.”⁴¹ He pointed out that the *Pfitsch* Court’s statement that district court jurisdiction implies a right to jury trial was dictum.⁴² Consequently, he concluded that the statement should not be construed to require jury trials whenever the Government waives sovereign immunity and provides for actions against it to be brought in district court.⁴³

In addition, Judge Tamm determined that the majority’s reliance on the *Lorillard* Court’s construction of ADEA section 7(c) was misplaced in a case construing section 15(c). He emphasized that *Lorillard* dealt with employees in the private sector, and that the Supreme Court did not discuss federal employees or waiver of sovereign immunity.⁴⁴ Judge Tamm also disagreed with the majority’s construction of the term “legal relief.” He argued that the *Lorillard* Court found the term significant only when it referred to suits covered by the seventh amendment.⁴⁵ Remarking that suits against the federal government are not encompassed by the seventh amendment, he reasoned that the term “legal relief” does not trigger a right to jury trials in section 15(c) actions.⁴⁶ As did the Government,⁴⁷ Judge Tamm found the failure of Congress to amend section 15(c) to be significant. He noted that “[w]here Con-

³⁹ Judge Tamm contended that waiver of sovereign immunity does not carry with it an automatic waiver of immunity from jury trials. He noted that the seventh amendment jury trial guarantee applies only to suits at “common law,” and that actions against the Government were not allowed at common law. *Id.* He reasoned that the seventh amendment therefore cannot be applied to suits against the United States, absent a clear congressional statement of authorization. *Id.* at 65-66. Because he was unable to find such a clear statement in the language of the ADEA, its legislative history, or the case law construing it, he concluded that Congress had not intended to authorize jury trials. *Id.* at 70.

⁴⁰ 256 U.S. 547 (1921).

⁴¹ 628 F.2d at 69.

⁴² *Id.* at 70. Judge Tamm noted that the major issue in *Pfitsch* was whether the district court was to have exclusive jurisdiction over actions brought under § 10 of the Lever Act, ch. 53, 40 Stat. 276 (1917), or was to have concurrent jurisdiction with the Court of Claims. 628 F.2d at 69-70. *See United States v. Pfitsch*, 256 U.S. at 549.

⁴³ 628 F.2d at 70.

⁴⁴ *Id.* at 69. Judge Tamm remarked that jury trials raise “different concerns” for federal employees than for those in private industry, expressing concern that “[j]uries may be too sympathetic toward plaintiffs in cases where the federal government is the defendant.” *Id.*

⁴⁵ *Id.* at 69.

⁴⁶ *Id.*

⁴⁷ *See text at note 35 supra.*

gress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded."⁴⁸ He determined that the failure to amend section 15(c) "cannot be deemed inadvertent," since Congress had amended other sections of the ADEA when it amended section 7(c) in 1978.⁴⁹

On the issues raised in *Nakshian*, the reasoning of the majority is more persuasive than that of Judge Tamm. Judge Tamm offered no precedent in support of his contention that there is a presumption against jury trials in suits where the government has otherwise waived its sovereign immunity. The majority, by contrast, advanced a logical argument, supported by prior case law,⁵⁰ that a right to trial by jury may be inferred from statutory language.⁵¹

The majority found adequate manifestation of Congress' intention to create a right to a jury trial in the language of the ADEA. The first indication of congressional intent was the grant of exclusive jurisdiction of section 15(c) actions to the federal district courts.⁵² As the majority noted, the Supreme Court in *United States v. Pfitsch*⁵³ stated that such a grant carries with it a right to jury trials.⁵⁴ Judge Tamm was correct in his assertion that the statement was dictum. Nevertheless, the Supreme Court found the jury trial issue important in reaching its decision in *Pfitsch*. The *Pfitsch* Court determined that Congress had been aware of the jury trial connotation when it granted sole jurisdiction of actions arising under section 10 of the Lever Act to the federal district courts, and that this awareness was in fact instrumental in Congress' decision not to grant concurrent jurisdiction with the Court of Claims.⁵⁵ If Congress was aware of the jury trial connotation in 1917, when it enacted the Lever Act, it can be assumed that Congress was equally aware of that connotation when it enacted ADEA section 15(c) in 1974.

The majority found a second manifestation of congressional intent to provide for jury trials in ADEA actions against the Government in the use of the term "legal relief" in section 15(c). In *Lorillard*, the Supreme Court held that "legal relief" is a term of art, which carries with it a connotation of right to trial by jury.⁵⁶ Although the ADEA plaintiff in *Lorillard* was a private-sector employee, the Court's reasoning applies with equal force to government employees.⁵⁷ The *Lorillard* Court reiterated the rule that, where a term which

⁴⁸ 628 F.2d at 68 (quoting *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815 (5th Cir. 1972) (en banc), cert. denied, 409 U.S. 948 (1972)).

⁴⁹ 628 F.2d at 69 n.8. Judge Tamm noted that Congress in 1978 had amended subsection (a) of § 633a, and had added subsections (f) and (g). *Id.* See 29 U.S.C. § 633a (Supp. II 1978).

⁵⁰ See, e.g., *Law v. United States*, 266 U.S. 494 (1925); *United States v. Pfitsch*, 256 U.S. 547 (1921).

⁵¹ 628 F.2d at 62-65. Furthermore, the majority remarked that, "if there are to be any presumptions [regarding method of trial], it would seem that the preference for jury trials in our jurisprudence would support a presumption in favor of such trials." *Id.* at 63 n.4.

⁵² See 29 U.S.C. § 633a(c) (1976).

⁵³ 256 U.S. 547 (1921).

⁵⁴ *Id.* at 550.

⁵⁵ *Id.* at 550-52.

⁵⁶ 434 U.S. at 583.

⁵⁷ The *Nakshian* majority acknowledged that *Lorillard* concerned private employees, but determined that "we must assume that Congress meant to confer the same rights when it used the same term in authorizing suits against the Government." 628 F.2d at 64.

has a "well-known meaning in common law or in the law of this country" is employed in a statute, Congress is presumed to be aware of the significance of the term.⁵⁸ Therefore, the *Lorillard* Court inferred that Congress was aware of the jury trial connotation of "legal relief" when it enacted section 7(c).⁵⁹ Since the Court in *Lorillard* thus assumed that Congress knew the significance of "legal relief" when it enacted section 7(c), it is logical to infer that Congress was aware of that significance when it later enacted section 15(c). Furthermore, it can be argued that, had Congress disagreed with the *Lorillard* Court's interpretation of "legal relief," it could have removed the term from section 15(c) when it amended section 7(c) to provide for jury trials.

The soundness of the majority's construction of "legal relief" is not refuted by Judge Tamm's argument that the *Lorillard* Court based its interpretation of that term on the seventh amendment, which does not apply to suits against the Government. Admittedly, the *Lorillard* Court stated that "[i]n cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial."⁶⁰ The seventh amendment, however, was not the basis of the *Lorillard* Court's decision. In fact, the Court stated earlier in the opinion that its resolution of the statutory construction issue made consideration of the constitutional (seventh amendment) issue unnecessary.⁶¹ The statement quoted above, therefore, can be considered dictum employed by the Court in reaching its determination that the use of the term "legal relief" in ADEA section 7(c) supported the inference that Congress intended for jury trials to be available in section 7(c) actions. Consequently, the Court's reference to the seventh amendment, read in context, simply means that Congress, in using the term "legal relief," brought ADEA section 7(c) actions within the coverage of the seventh amendment. The *Nakshian* majority therefore seems correct in its assumption that the use of the same term in section 15(c) as in section 7(c) brought actions against the federal government within the coverage of the seventh amendment, although they would not belong there absent a congressional mandate.⁶²

The final source of contention between the majority and Judge Tamm was the failure of Congress to amend ADEA section 15(c) in 1978 when it amended section 7(c) to provide explicitly for trial by jury. Judge Tamm noted that Congress had altered several sections surrounding 15(c) in 1978, and therefore could have amended section 15(c) had it so intended.⁶³ This is Judge Tamm's most persuasive argument, since Congress at that time did have an opportunity to provide explicitly for jury trials in section 15(c) actions. Nevertheless, the grant of sole jurisdiction in the federal courts and the use of the term "legal relief" are positive indications that Congress intended to make jury trials available for federal employees. In light of these positive indications, Congress' omission of an explicit grant of a right to jury trials is not decisive. Moreover, it can be argued that, had Congress intended to bar jury trials, it would have

⁵⁸ 434 U.S. at 583 (quoting *Standard Oil v. United States*, 221 U.S. 1, 59 (1911)).

⁵⁹ 434 U.S. at 583.

⁶⁰ *Id.*

⁶¹ *Id.* at 577.

⁶² 628 F.2d at 64.

⁶³ 628 F.2d at 69 n.8.

amended section 15(c) to make that intention clear when it amended the surrounding sections.⁶⁴ In addition, as the majority noted, the failure of Congress to amend section 15(c) when it amended section 7(c) "is easily explained by the fact that the cases which prompted congressional action were brought against private employers."⁶⁵

In *Nakshian*, the D.C. Circuit established the right to a jury trial for plaintiffs bringing ADEA actions against the federal government. The impact of *Nakshian* in other circuits, however, remains to be seen. Although the reasoning of the majority is persuasive, Judge Tamm's dissent presents arguments which undoubtedly will be raised in attempts to block jury trials in these circuits. Until Congress makes a definitive statement on the right of all federal employees to jury trials in ADEA actions, section 15(c) plaintiffs are likely to encounter delays in reaching the merits of their cases while interlocutory appeals on the jury trial issue are being decided. In the interest of clarity and judicial economy, Congress should take the initiative and make a definitive statement authorizing jury trials in section 15(c) actions without waiting for further judicial construction of the ADEA.

D. *Standard of Proof: Jepsen v. Florida Board of Regents**

The Supreme Court in *McDonnell Douglas Corp. v. Green*¹ enunciated the proper order and nature of proof in Title VII² cases. According to the standard set forth in *McDonnell Douglas*, the complainant has the initial burden of estab-

⁶⁴ This conclusion finds support in the remarks of Congressman Pepper, Chairman of the House Committee on Aging and a member of the Conference Committee on the 1978 amendments to the ADEA. Congressman Pepper placed the following statement in the Congressional Record on September 5, 1979:

Those who participated in the House and Senate debates [on the amendment] would be surprised to learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial. Under any legislative enactment in the field of civil rights, the Federal Government should be the leader not a grudging participant. . . . As chairman of the Committee on Aging, I will continue to watch developments in this area, and will ask for further delineation of the right of Federal employees to a jury trial if conflicting judicial interpretations are not resolved in favor of a jury trial.

125 CONG. REC. E4258 (daily ed. Sept. 9, 1979) (remarks of Rep. Pepper).

⁶⁵ 628 F.2d at 65. See, e.g., *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978); *Pons v. Lorillard*, 549 F.2d 950 (4th Cir. 1977), aff'd, 434 U.S. 575 (1978); *Morelock v. NCR Corp.*, 546 F.2d 682 (6th Cir. 1978), vacated and remanded, 435 U.S. 911 (1978).

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¹ 411 U.S. 792 (1972).

² 42 U.S.C. § 2000 et seq. (1976). Title VII was amended by the Equal Opportunity Act of 1972, § 3, 86 Stat. 103 (1972), to bring educational institutions within the purview of the Act. 42 U.S.C. § 2000e-2 provides in pertinent part:

It shall be an unlawful employment practice for an employer — to fail or refuse to

lishing a prima facie case of discrimination.³ A complainant may prove her prima facie case by establishing that (1) she belongs to a protected class, such as a particular race or sex; (2) she applied and was qualified for the job in question; (3) despite her qualifications she was rejected; and (4) after her rejection, the employer continued to seek applicants with her qualifications.⁴ Once the complainant has completed this step, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions.⁵ If the employer convinces the court of the legitimacy of its reason for seeking other job applicants after denying the complainant a position, the plaintiff then has the burden of proving that the employer's articulated basis was in fact pretext.⁶

Since the Supreme Court's decision in *McDonnell Douglas*, a major issue has arisen regarding its applicability to Title VII cases involving academic institutions. Several federal courts have refused to adopt the *McDonnell Douglas* standard of proof in suits against universities.⁷ These courts instead have required the employee to satisfy a more stringent standard of proof⁸ because of a judicial reluctance to interfere with the professional hiring and promotional practices of educational institutions.⁹ The reasoning for this approach is that

hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or,

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

³ 411 U.S. at 802.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 804.

⁷ See, e.g., *Faro v. New York Univ.*, 502 F.2d 1229, 8 FEP Cas. 609 (2d Cir. 1974), *aff'd*, 8 FEP Cas. 319 (S.D.N.Y. 1973) (Female research associate professor sought injunctive relief forbidding medical school to terminate her. The court rejected her claim of sex discrimination.). *Faro* was the first major Title VII decision involving a university. *Green v. Board of Regents*, 335 F. Supp. 249, 4 FEP Cas. 126 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594, 5 FEP Cas. 677 (5th Cir. 1973) (Plaintiff charged sex discrimination in the university's failure to promote her to the rank of full professor. The court followed the university's decision against promotion.). Many other courts have relied on the philosophy expressed in *Faro* that courts should exercise minimal scrutiny of university employment practices. *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1353-54, 15 FEP Cas. 1516, 1537-38 (W.D. Pa. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857, 868, 12 FEP Cas. 297, 305 (D. Vt. 1976); *Labat v. Board of Higher Educ.*, 401 F. Supp. 753, 757, 10 FEP Cas. 1449, 1452 (S.D.N.Y. 1975).

⁸ See, e.g., *Green v. Board of Regents*, 335 F. Supp. 249, 4 FEP Cas. 126 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594, 5 FEP Cas. 677 (5th Cir. 1973). Rather than apply *McDonnell Douglas*, the court stated that the decisions of universities are to be upheld by the courts when reached by the correct procedures and supported by substantial evidence. 335 F. Supp. at 250, 4 FEP Cas. at 127.

⁹ In *Green v. Board of Regents*, 335 F. Supp. 249, 4 FEP Cas. 126 (N.D. Tex. 1971), the court stated: "It is undisputed that such evaluations [of a person's qualification] are necessarily judgmental, and the Court will not substitute its judgment for the rational and well considered judgment of those possessing expertise in the field." *Id.* at 250, 4 FEP Cas. at 127.

the hiring and promotional decisions of universities are based upon subjective criteria,¹⁰ and thus are the least suited for supervision by the courts.¹¹

In contrast, other federal courts have insisted that the *McDonnell Douglas* standard of proof be utilized in such situations.¹² In particular, in *Jepsen v. Florida Board of Regents*,¹³ a case decided during the *Survey* year, the Court of Appeals for the Fifth Circuit held that the burden of proof articulated in *McDonnell Douglas* was applicable to suits involving universities.¹⁴ With its decision in *Jepsen*, the Fifth Circuit has joined the First and Second Circuits in holding that plaintiffs should not have to meet a higher burden of proof in Title VII claims against academic institutions than in Title VII suits against other employers.

The plaintiff in *Jepsen* was a female associate professor of English at Florida State University.¹⁵ Dr. Jepsen was first employed by the university in 1946 as an instructor.¹⁶ In 1947 she was promoted to the rank of assistant professor, which position she held until 1971, when she was promoted to associate professor. By 1974, when Dr. Jepsen filed suit, she had never been promoted to the rank of full professor and she was receiving a salary of \$13,905 for a nine-month academic year.¹⁷ Dr. Jepsen filed suit in the United States District Court for the Northern District of Florida, claiming that the defendant university had discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act.¹⁸ She alleged that, because of her sex, the university had denied her a promotion to the rank of full professor and had failed to grant her a salary increase.¹⁹ In support of her claim, Dr. Jepsen maintained that

¹⁰ One subjective criterion which faculty members and other professionals often look at in evaluating their peers is the personality of the individual in question. *Faro*, 502 F.2d at 1232, 8 FEP Cas. at 611. Other such subjective criteria include the specifications of the particular position and the quality of the person's educational experience. *Id.* It is not enough that a candidate possess the requisite degree. Rather, consideration is also given to the reputation of the degree-issuing institution.

¹¹ *Faro*, 502 F.2d at 1231, 8 FEP Cas. at 610.

¹² See, e.g., *Kunda v. Muhlenberg College*, 22 FEP Cas. 62 (3d Cir. 1980) (Female faculty should not be denied a "meaningful remedy" merely because the complainant's case occurred in an academic setting. In requiring the college to grant plaintiff tenure, the court treated the university the same as other Title VII defendants.). *Powell v. Syracuse Univ.*, 580 F.2d 1150, 17 FEP Cas. 1316 (2d Cir. 1978) (Black female teacher formerly employed by university brought Title VII action. The district court and court of appeals applied *McDonnell Douglas*.).

¹³ 610 F.2d 1379, 21 FEP Cas. 1700 (5th Cir. 1980), *rev'd*, 21 FEP Cas. 1695 (D.N.D. Fla. 1977).

¹⁴ *Id.* at 1382, 21 FEP Cas. at 1702-03.

¹⁵ *Id.* at 1380, 21 FEP Cas. at 1700.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1381, 21 FEP Cas. at 1701.

¹⁹ *Id.* Dr. Jepsen also asserted that the defendants were guilty of discrimination prior to 1972, the year in which Title VII was amended to apply to governmental entities and educational institutions. Although pre-1972 discrimination by a university is not actionable under Title VII, the plaintiff alleged that the earlier failure to promote her had a discriminatory impact on her eligibility for promotion now and on her current salary level. According to Dr. Jepsen, she had been limited to the position of assistant professor for 25 years while equally qualified men had been promoted after five or six years. *Id.* On appeal, the plaintiff raised another issue, regarding the scope of discovery of faculty evaluation forms crucial to her case. Prior to trial she had filed a motion to compel discovery, requesting the district court to grant her access to 14 faculty evaluation forms. The district court ordered that the plaintiff's counsel could examine any of the forms

male faculty members with whom she was equally, if not more, qualified had been promoted and had been granted higher pay raises than she had received.²⁰

The district court rejected her claim, concluding that it was unsupported by the evidence.²¹ At the outset of its decision, the court noted that promotion and tenure decisions in an academic setting required the use of subjective criteria for evaluating candidates.²² The district court expressed a reluctance to interfere with the professional judgment of the faculty and thus adopted a higher "abuse of discretion"²³ standard of proof in lieu of the traditional Title VII standard set out in *McDonnell Douglas*.²⁴ Relying on the university's evaluation of Dr. Jepsen's credentials and performance, the court concluded that Jepsen had not proven a clear abuse of discretion by the university.²⁵ Absent such a showing, the court would not substitute its own judgment for that of Dr. Jepsen's peers.²⁶

Dr. Jepsen appealed the district court's dismissal for her action to the United States Court of Appeals for the Fifth Circuit. Reversing the district court's decision, the court of appeals held that it was improper for the district court to apply an "abuse of discretion" standard in a Title VII suit against the university.²⁷ Although the court acknowledged that this standard had been applied previously in Title VII actions against educational institutions,²⁸ the *Jepsen* court maintained that such institutions are not entitled to any special deference under Title VII.²⁹

In adopting this approach, the court of appeals relied heavily on *Board of Trustees v. Sweeney*.³⁰ This Supreme Court decision involved a Title VII suit

containing evaluations of less than satisfactory. However, the court would not allow copies to be made of these forms. The court of appeals held that the plaintiff should have been allowed to introduce these documents into evidence. The defendant university rebutted Dr. Jepsen's *prima facie* case by asserting that they based their decision not to grant her tenure and a raise on unbiased faculty evaluations. The court of appeals reasoned that if the university was making such assertions, then Dr. Jepsen should be permitted to rely on these unbiased evaluation forms to establish that the university's explanation was pretext and that the university was in fact biased. *Id.* at 1381, 21 FEP Cas. at 1701-02.

²⁰ *Id.* 21 FEP Cas. at 1701.

²¹ *Jepsen v. Florida Board of Regents*, 21 FEP Cas. 1695, 1699 (D.N.D. Fla. 1977).

²² *Id.* at 1698. Because of the subjective nature of faculty promotional and hiring decisions, "[t]he court cannot tell a university that it has set its standards too high for its employees. Instead, the claims must be reviewed in light of the standards used by the university and the court must be convinced that there had been uniform application." *Id.*

²³ The district court adopted an "abuse of discretion" standard because it did not consider it appropriate to substitute its own judgment for the professional judgment of Dr. Jepsen's peers. *Id.* at 1699. The court noted that the faculty members were in constant contact with Dr. Jepsen and that they were in a superior position to make such evaluations. In light of these facts, the court felt reluctant to challenge the decision of the evaluation committee in the absence of a showing of an abuse of discretion on their part. *Id.*

²⁴ *Id.* at 1699. The district court found support for its contention in *Green v. Board of Regents*, 335 F. Supp. 249, 4 FEP Cas. 677 (5th Cir. 1973), and *Faro v. New York Univ.*, 502 F.2d 1229, 8 FEP Cas. 609 (2d Cir. 1974). *Id.*

²⁵ 21 FEP Cas. at 1699.

²⁶ 21 FEP Cas. at 1699.

²⁷ 610 F.2d at 1381, 21 FEP Cas. at 1702.

²⁸ See text and notes at notes 2-3 *supra*.

²⁹ 610 F.2d at 1382, 21 FEP Cas. at 1702-03.

³⁰ 439 U.S. 24 (1978).

brought against Keene State College, and the *Jepsen* court interpreted the case as sanctioning the application for traditional Title VII standards to suits against educational institutions.³¹ *Sweeney* involved a factual situation very similar to the *Jepsen* case. The complainant in *Sweeney* was denied a promotion and she thus brought a Title VII action against the college, claiming that the school had discriminated against her on the basis of sex by failing to promote her.³² In addition to referring to *Sweeney*, the *Jepsen* court also noted that caution against intervention in a university's affairs cannot be allowed to undercut the explicit intent of Title VII.³³ Through Title VII, Congress sought to assure equality of employment opportunities and to abolish discriminatory practices which have created racially and sexually stratified jobs.³⁴ The "abuse of discretion" standard that had been adopted by the district court in *Jepsen* would mean that courts would defer to faculty judgments that may be biased against female faculty members. To assure that the courts do not abdicate their responsibility to provide a forum for litigating all complaints of sex discrimination the *McDonnell Douglas* standard should be adopted. According to the *Jepsen* court, if courts continue to defer to the judgments of the university faculty, they are allowing employment bias to go unchecked.³⁵ Thus, the *Jepsen* court concluded that the burden of proof standard articulated in *McDonnell Douglas* should be applied to Title VII actions against universities as well as against other employers under this Act.³⁶

In attempting to treat discrimination by an employer university in the same manner as discrimination by a different type of employer, *Jepsen* is supported by the amended version of Title VII as well as the *Sweeney* decision which applied the *McDonnell Douglas* standard to the area of university hiring and promotions. In utilizing this standard, the *Sweeney* court of appeals stated:

[W]e caution against permitting abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.³⁷

Since *Sweeney*, another important case has been decided in the Second Circuit. The court of appeals in *Powell v. Syracuse University*³⁸ abandoned its earlier

³¹ 610 F.2d at 1382, 21 FEP Cas. at 1702-03.

³² *Id.*

³³ *Id.* (quoting *Sweeney v. Board of Trustees*, 569 F.2d 169, 176 FEP Cas. 378, 383 (1st Cir.), *vacated and remanded*, 439 U.S. 24 (1975)).

³⁴ *Id.*

³⁵ *Id.* at 1383, 21 FEP Cas. at 1703.

³⁶ *Id.* at 1382, 21 FEP Cas. at 1702.

³⁷ 569 F.2d at 176.

³⁸ 580 F.2d 1150, 17 FEP Cas. 1316 (2d Cir. 1978). Plaintiff in *Powell* was a black female teacher at Syracuse University. The university's Tenure Committee voted to terminate plaintiff's employment. 580 F.2d 1152, 17 FEP Cas. at 1318. Plaintiff refused to submit her letter of resignation and appealed the Committee's decision to the Subcommittee on Academic Freedom. *Id.* The Subcommittee found no evidence of discrimination but noted that there were

position in *Faro v. New York University*³⁹ in which the court had deferred to the professional judgment of the faculty.⁴⁰ In contrast, the *Powell* court adopted the *McDonnell Douglas* standard for cases involving universities.⁴¹ The *Powell* court stressed that courts would no longer tolerate the unlawful behavior of universities which discriminate in their hiring and promotional practices.⁴²

In applying the *McDonnell Douglas* standard to cases of discrimination at the university level, both the *Sweeney* and *Powell* courts reasoned that the amendment to Title VII compelled their decisions.⁴³ In 1972, Congress passed an amendment which extended the application of Title VII to educational institutions.⁴⁴ Congress passed this amendment because it recognized that the problem of employment bias at the university level was as much a reality as it was in any other area of employment.⁴⁵ In the words of the House Report:

There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational employees — primarily teachers — from Title VII coverage. Discrimination in education is as pervasive as discrimination in any other area of employment.⁴⁶

Consequently, it would seem that if Congress was as troubled by the widespread discriminatory practices at the university level as it was by such practices among other employers it would want to see the federal courts treat every case of discrimination, even those occurring at academic institutions, with the same degree of sensitivity. The *Jepsen* court thus was correct in applying to universities the traditional burden of proof standards articulated in *McDonnell Douglas*. By applying the *McDonnell Douglas* standard to university situations the *Jepsen* court sought to assure that all cases of discrimination will be treated alike.

procedural irregularities in the disposition of the case. *Id.* It recommended that plaintiff be reinstated but the dean refused to do so. *Id.* The university then hired a white male and a white female. *Id.* Plaintiff brought a Title VII suit against the university, claiming that her dismissal was a product of racial and sexual discrimination. *Id.* at 1151, 21 FEP Cas. at 1316.

³⁹ 502 F.2d 1229, 8 FEP Cas. 609 (2d Cir. 1974). Plaintiff in *Faro* was a female research associate professor. 502 F.2d at 1230, 8 FEP Cas. at 609. In 1971, the plaintiff received notice that her appointment would be terminated as of August 31, 1972. *Id.* at 1231, 8 FEP Cas. at 610. Plaintiff did receive an offer of a new appointment without tenure possibilities but with a continuation of current salary and fringe benefits. *Id.* She sought a preliminary injunction forbidding the medical school to terminate her employment and requiring the school to place her in a teaching job that retains her in the tenure chain. *Id.* Plaintiff based her claim on the ground that the university had discriminated against her on the basis of sex. *Id.*

⁴⁰ *Id.* at 610.

⁴¹ 580 F.2d at 1154, 17 FEP Cas. at 1319.

⁴² *Id.*

⁴³ *Powell*, 580 F.2d at 1154, 17 FEP Cas. at 1319; *Sweeney*, 569 F.2d at 173, 16 FEP Cas. at 383.

⁴⁴ H.R. REP. NO. 238, 92d Cong., 2d Sess. (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2137, 2155.

⁴⁵ See *Powell*, 580 F.2d at 1154, 17 FEP Cas. 1319.

⁴⁶ H.R. REP. NO. 238, 92d Cong., 2d Sess. (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 2137, 2155.

Although *Jepsen* endeavors to effectuate the congressional purpose behind the 1972 amendment to Title VII, it is an insufficient attempt to assure that courts will evaluate independently a Title VII plaintiff's claim against a university. Under *Jepsen*, the plaintiff is given an opportunity to establish a prima facie case of discrimination.⁴⁷ As one element of her prima facie case, however, a Title VII plaintiff must prove that she is qualified for the position denied her.⁴⁸ Because decisions regarding promotion and tenure in higher education cannot be measured by objective evaluation of an applicant's qualification, many courts, purporting to use the *McDonnell Douglas* standard, may be unable to make their own judgments regarding the qualifications of the plaintiff.⁴⁹ In a belief that they lack the expertise in the educational area to apply subjective criteria in evaluating an applicant, these courts are willing to defer to the professional judgment of those who are in constant contact with the candidate and those with the expertise to apply these criteria.⁵⁰ Thus, even without having to show a clear abuse of discretion, the plaintiff may have difficulty demonstrating that she was qualified for the job, because the courts may continue to defer to the judgments of the faculty.⁵¹ Furthermore, since the qualifications for an academic position are generally not capable of objective measurement, a plaintiff may find it exceedingly difficult even to establish what the qualifications for the job are. She must, however, know what the job requirements are before she can prove that she is qualified.

Finally, for those courts willing to decide without university assistance whether a candidate is qualified for an academic position, *Jepsen* does not provide criteria for determining the relative weight to be assigned the various attributes of the applicant. Consequently, even though *Jepsen* states that deference in the abstract is improper and that the plaintiff shall have the right to establish her prima facie case, courts may still find themselves coming to the same conclusion under *McDonnell Douglas* as they would have had they applied an "abuse of discretion" standard.

In applying the *McDonnell Douglas* standard to Dr. Jepsen's Title VII action against Florida State University, the court of appeals took a step toward eliminating employment bias in the area of higher education. At the same time that *Jepsen* requires the courts to intervene in a university's hiring and promotional decisions, the *Jepsen* decision is no guarantee that university Title VII actions will be treated the same as other Title VII actions. It is, however, a vantage point from which other courts can work towards this end.

⁴⁷ 610 F.2d at 1382, 21 FEP Cas. at 1702.

⁴⁸ *Id.*

⁴⁹ See, e.g., *Lieberman v. Grant*, 20 FEP Cas. 877 (D. Conn. 1979).

⁵⁰ 21 FEP Cas. at 1698.

⁵¹ *Lieberman v. Grant*, 20 FEP Cas. 877 (D. Conn. 1979), is an excellent illustration of how the courts continue to defer to the professional judgment of the faculty even under the *McDonnell Douglas* standard. The plaintiff in *Lieberman* was allowed to establish her prima facie case. 20 FEP Cas. at 888. The court then ruled that the university had successfully rebutted the plaintiff's prima facie case of sex discrimination by showing that she was not promoted because of "the honest and sincere belief of those who were charged with evaluating her work that neither her teaching nor her scholarship were of sufficient quality to merit a lifetime appointment." *Id.*

II. THE EMPLOYER'S ACTIONS AND PROGRAMS: DISCRIMINATION V. NON-DISCRIMINATION

A. *Employer's Indirect Discrimination: DeGrace v. Rumsfeld**

Under Title VII of the Civil Rights Act of 1964, "[a]ll personnel actions affecting employees . . . in military departments . . . shall be made free from any discrimination based on race, color, religion, sex or national origin."¹ Typically, an employer will be held liable under section 2000e-1b(a) if it is shown that "but for" his own, direct discrimination, he would not have discharged the plaintiff-employee.² Under some circumstances, however, an employer covered by the terms of section 2000e-1b(a) legally may be responsible not only for his own, direct acts of discrimination, but also for the discriminatory conduct of his employees, if such behavior is condoned.³ Accordingly, where an employee is racially harassed by fellow employees, section 2000e-1b(a) imposed an affirmative duty on the employer to take reasonable measures to correct the situation.⁴

During the *Survey* year, the Court of Appeals for the First Circuit, in *DeGrace v. Rumsfeld*,⁵ addressed the question of whether the discriminatory acts of an employee's coworkers could taint a personnel decision regarding that employee so as to make the decision violative of section 2000e-1b(a). In answering this query in the affirmative, the court held that discharging an employee for absenteeism resulting from racial harassment on the part of the employee's coworkers, when uncorrected by the worker's supervisor, is not an employment decision " 'free from any discrimination based on race' " ⁶ as defined in section 2000e-16(a). This decision is significant in two respects. First, it liberally interprets section 2000e-16(a), finding that an employer's decision to discharge an employee is discriminatory within the meaning of the Act even though the employer himself acted without any discriminatory intent. Second, of equal significance, the court used a "but for" causation test that did not focus on whether the discharge of the employee would have occurred "but for" the employer's discrimination, but instead, examined whether the employee's conduct that led to the discharge would have occurred "but for" the discrimination of other employees at the place of employment. The court's expansive reading of section 2000e-16(a)'s reference to "personnel actions . . . free from

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¹ 42 U.S.C. § 2000e-16(a) (1976). This section provides the exclusive remedy for claims of discrimination in federal employment. *Brown v. General Serv. Admin.*, 425 U.S. 820, 829 (1976). Section 2000e-16(a), however, does not apply to uniformed members of the military. *Johnson v. Hoffman*, 424 F. Supp. 490, 493 (E.D. Mo. 1977), or to discrimination against the physically handicapped, *McNutt v. Hills*, 426 F. Supp. 990, 1002 (D.D.C. 1977).

² *Givhan v. Western Consol. School Dist.*, 429 U.S. 410, 417 (1979); *Loeb v. Textron, Inc.*, 500 F.2d 1003, 1019 (1st Cir. 1979). See text at notes 39-43 *infra*.

³ *Bell v. St. Regis Paper Co., Container Div.*, 425 F. Supp. 1125, 1137 (N.D. Ohio 1976).

⁴ *Id.*

⁵ 614 F.2d 796, 21 FEP Cas. 1444 (1st Cir. 1980).

⁶ *Id.* at 804, 21 FEP Cas. 1449.

any [racial] discrimination" led to the use of the "but for" test in this novel manner, making the employee's, rather than the employer's, actions the focus of the inquiry.

In *DeGrace*, the plaintiff was a civilian firefighter employed by the Naval Air Station of South Weymouth (NASSW).⁷ In November and December, 1974, he received three notes containing racially offensive comments and threats of harm. Furthermore, at about the same time he also discovered that some of his work equipment had been damaged.⁸ DeGrace stated that the notes made him nervous, ill, and afraid to go to work.⁹ As a result, he called in sick and remained absent from duty from November 19 through December 21, 1974.¹⁰ At no time did he provide medical certification for his absence.¹¹ DeGrace had been informed as early as December 6, 1974, that he must submit a written request for continued absence, and state a justification for this request.¹² He was also notified that a failure to get approval of such a request would make him as absent without official leave (AWOL), and subject him to disciplinary action.¹³ DeGrace never complied with this requirement.¹⁴ On December 21, 1974, however, DeGrace returned to work stating that he had regained his health and that henceforth he would report for work regularly.¹⁵ Despite these assurances, DeGrace, did not report to work again until January 4, 1975.¹⁶ At that time, he, for the first time, informed his commander of the threatening notes, and revealed that his absence was due to fear for his personal safety.¹⁷ After reading photostatic copies of the notes, his commander reported the incident to the base commanding officer, who ordered an investigation by the Naval Investigating Service (NIS).¹⁸ On January 8, 1975, DeGrace again met with his supervising commander.¹⁹ At this time he stated that his continued absence was due to concern over the notes, although he also indicated that his apprehension would not prevent his return to duty on his next scheduled tour beginning January 10.²⁰ Again, however, in spite of his

⁷ *Id.* at 798, 21 FEP Cas. 1445. This was the second time that DeGrace had been discharged from his job at the NASSW and the second time that he claimed that his discharge was the product of racial discrimination. DeGrace was first employed at NASSW in June, 1971 and was the only black firefighter during the course of his employment. After a one year probationary period, DeGrace was discharged for failure to "demonstrate qualifications necessary to promote the efficiency of the service." *Id.* at 799, 21 FEP Cas. 1445. This discharge was appealed through Civil Service Commission procedures. The EEO Complaints Examiner found that the opinions of those who testified against the plaintiff were tainted by racial bias. The Examiner recommended that DeGrace be reinstated, and that his supervisors be admonished. This first discharge was not the subject of the current action. *Id.* at 799-800, 21 FEP Cas. at 1445-46.

⁸ *Id.* at 800, 21 FEP Cas. at 1446.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 801, 21 FEP Cas. at 1447.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 800, 21 FEP Cas. at 1446.

¹⁶ *Id.*

¹⁷ *Id.* at 801, 21 FEP Cas. at 1446.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

assurances to the contrary DeGrace did not return until January 22. At that time he met with an NIS investigator, and expressed interest in proceeding with the investigation.²¹ Nevertheless, two days after this meeting DeGrace, on advice from his attorney, decided to refrain from cooperating with the investigation.²² He refused to surrender the originals of the notes for handwriting analysis, and, on his request, the investigation ultimately was cancelled.²³ As a result of DeGrace's failure to seek approval for his continued absence, the NASSW notified him on February 7, 1975, of its intention to discharge him for excessive and unauthorized absenteeism.²⁴ DeGrace subsequently brought an action in federal district court against the Secretary of Defense and others under 42 U.S.C. § 2000e-16(a), claiming that his discharge was the product of racial discrimination.²⁵

The district court found that one or more of DeGrace's coworkers were responsible for the notes.²⁶ It also found that the coworkers regularly engaged in racially discriminatory conduct toward DeGrace and that at least part of the reason underlying his continuous absence was fear for his personal safety. The court maintained that the NASSW fire department was "infected with pervasive racism"²⁷ and that the supervisory personnel should have known of this and, taken affirmative steps to correct it.²⁸ The court found that this obligation had not been satisfied.²⁹

Despite these findings, the district court held that the commander was warranted in deciding that DeGrace's absence, without authorization or sub-

²¹ *Id.* 21 FEP Cas. at 1447.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 798, 21 FEP Cas. at 1444. DeGrace initially brought the present suit as a class action against the respondent. The district court certified a class of "all past, present, and future black civilian employees, applicants, and deterred applicants at NASSW." *Id.* at 799, 21 FEP Cas. at 1445. After trial was completed but before a decision was rendered, the class was decertified because plaintiff's interests were not "such as to cause him to fairly and adequately protect the interests of the class." *Id.* (quoting district court's unpublished opinion). The decertification was upheld on appeal. *Id.* at 810-11, 21 FEP Cas. at 1453. The court of appeals recognized that employees may represent job-applicants in class actions, but would not allow plaintiff-employee to do so in this case. *Id.* This conclusion was based on the court's finding that plaintiff's claim did not involve hiring practices, nor did his individual grievance (termination) implicate such practices. Moreover, plaintiff did not seek reinstatement but only damages. Because reinstatement was not sought, plaintiff had no stake in the relief that would be appropriate for a class. For these reasons, the court found that plaintiff was not the proper party to represent the interests of the asserted class. *Id.* 21 FEP Cas. at 1453-54. See also *Young v. Edgcomb Steel Co.*, 363 F. Supp. 961 (M.D.N.C. 1973), modified, 499 F.2d 97 (4th Cir. 1974); *Jackson v. Dukakis*, 526 F.2d 64, 67 (1st Cir. 1975) (employee or former employee is proper representative of non-employees under FED. R. CIV. P. 23); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 246-47 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975) (former employees who did not seek reinstatement are permitted to represent a class of present and future employees where the former employees' individual claim implicates hiring practices affecting all class members).

²⁶ *DeGrace*, 614 F.2d at 800, 21 FEP Cas. at 1446.

²⁷ *Id.* at 803, 21 FEP Cas. at 1448 (quoting the opinion of the district court which is unreported).

²⁸ *Id.*

²⁹ *Id.*

stantial excuse, was grounds for dismissal.³⁰ The court concluded that the discharge was the product of the commander's concern about the danger created by an understaffed firefighting force, and was not the result of any racial consideration.³¹ Accordingly, the court refused to grant any relief to DeGrace.³²

On appeal before the United States Court of Appeals for the First Circuit, DeGrace claimed that the district court erred in holding that his discharge was not the result of racial discrimination within the meaning of section 2000e-16(a). He argued that this conclusion was inconsistent with the court's findings that the fire department was replete with racism, and that his superiors had done nothing to ameliorate this situation.³³ The court of appeals agreed with DeGrace, and therefore, reversed the district court. In doing so, the court of appeals focused on the relationship between DeGrace's fear, stemming from racial harassment by his coworkers, and his prolonged absence from work.³⁴ The court concluded that although the actual decision to discharge may have been free of any racial bias, DeGrace's absenteeism was the product of both racial harassment and his supervisor's failure to prevent such misconduct.³⁵ Thus, the district court was correct in finding that there was no direct relationship between DeGrace's discharge and any racial discrimination on the commander's part. The discharge, however, was the indirect result of racial discrimination, and the court failed to recognize that such indirect discrimination falls within the purview of section 2000e-16(a). Consequently, the district court erred in finding that the discharge was "free from *any* racial discrimination based on race"³⁶ and in assuming that there was no basis for relief in the absence of any direct racial bias on the commander's part. Accordingly, the court of appeals vacated the lower court's judgment and remanded the case for further findings.³⁷

In making its decision, the court of appeals articulated the burden of proof that a plaintiff-employee must satisfy to establish a section 2000e-16(a) violation.³⁸ In order to prevail, an employee who claims that his discharge was based on absenteeism stemming from offensive conduct of fellow employees must establish: (1) that the misconduct of his coworkers was racially motivated and that it reasonably placed him in fear for his personal safety; (2) that his supervisor was or should have been aware of this misconduct and of the employee's fear, but failed to take reasonable measures to deal with the situation; (3) that he would have reported to work but for his reasonable fear, and his supervisor's culpable failure to take corrective action; and (4) that he acted reasonably under the circumstances.³⁹

Next the court considered the adequacy of the district court's findings as to each element of this four part test.⁴⁰ First, with regard to the reasonableness

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* 21 FEP Cas. at 1449.

³⁶ *Id.* at 804, 21 FEP Cas. at 1449 (quoting 42 U.S.C. § 2000e-16(a) (emphasis added)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 804-07, 21 FEP Cas. at 1449-51.

of plaintiff's fear for his personal safety, the appellate court concluded that the findings below were sufficient to indicate that DeGrace's fear was both reasonable and the product of the racial misconduct of other employees.⁴¹

As for the second element, whether NASSW acted reasonably after it knew or should have known of DeGrace's fear, the court of appeals found the analysis of the district court to be incomplete.⁴² Although the lower court found that NASSW could have done more to dissipate the racially hostile climate, it did not make an express finding as to whether NASSW had acted reasonably after learning of the threatening notes. The court of appeals acknowledged that the Navy had instigated investigation, which DeGrace had opposed, but stated that other corrective measures may have been available.⁴³

With regard to the third element of proof, whether DeGrace would have reported to work but for his reasonable fear of harm, the court of appeals characterized the district court's findings as ambiguous.⁴⁴ The court of appeals stated that plaintiff could prevail only if his fear was the "determinative factor"⁴⁵ with regard to his absence. It emphasized that "[a] proper excuse such as fear for personal safety, reasonably based, must not only be available to the plaintiff, but plaintiff must actually be acting on this ground before he can claim his absence was justified."⁴⁶ Although the lower court determined that fear was "at least part"⁴⁷ of the reason for his absence, this finding fell short of the requirement that "but for" this fear, DeGrace would have returned to work.⁴⁸ The district court's opinion was also inadequate because it failed to determine whether plaintiff's fear was reasonable for the entire length of his absence or only for a portion of that time.⁴⁹

⁴¹ *Id.* at 804, 21 FEP Cas. at 1449. Although the district court did not expressly qualify plaintiff's fear as reasonable, it did find that the notes were authored by his coworkers. The court of appeals stated that "[i]mplicit is the finding that the fear stems from the notes since there is no other reason for plaintiff's apprehension," and that "defendants [do not] contend that fear would be an unreasonable, aberrational response to notes of such a tenor especially in light of firefighters' occupational situation where mutual dependency and cooperation is required for safe firefighting." *Id.*

⁴² *Id.* at 805, 21 FEP Cas. at 1449-50.

⁴³ *Id.*, 21 FEP Cas. at 1450. One alternative measure suggested by the court of appeals was intradepartmental investigation which, it noted, plaintiff claimed to favor. *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 806, 21 FEP Cas. at 1450.

⁴⁶ *Id.*

⁴⁷ *Id.* (quoting from the district court's opinion).

⁴⁸ *Id.* The "but for" test was enunciated by the United States Supreme Court in *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, a discharged non-tenured teacher claimed that a school district's refusal to rehire him was based upon the exercise of his right of free speech. Thus, he asserted that the discharge violated his first and fourteenth amendment rights and sought reinstatement and damages. The court held that although constitutionally protected conduct played a substantial part in the decision not to rehire the plaintiff, the decision was not necessarily a constitutional violation. *Id.* at 285. The Board could escape liability, if it could, by a preponderance of the evidence, that it would have reached the same decision in the absence of the protected conduct. *Id.* at 287. In essence, the Board had to prove that there was no "but for" relation between its decision and the teacher's speech.

⁴⁹ *DeGrace*, 614 F.2d at 806, 21 FEP Cas. at 1450. DeGrace was absent from November 17, 1974 to January 22, 1975. The court of appeals directed the district court to determine if DeGrace's absence for this length of time was reasonable. If the district court found that this absence was unreasonably excessive, it was then to determine whether DeGrace's absence was

Regarding the fourth element of proof, requiring that the plaintiff show that he acted reasonably under the circumstances, the court of appeals reached several important conclusions. Noting that "[n]ot every response by the victim of racial discrimination can be excused,"⁵⁰ the court stated that DeGrace had a duty to act reasonably.⁵¹ This duty required him to bring matters to the attention of NASSW in a timely fashion, and to cooperate with, or at least not impede, NASSW's good faith effort to correct the situation.⁵² Specifically, the court stated that DeGrace could not block NASSW's investigations without explaining his reasons for such action and at the same time assert his right to remain absent.⁵³ To illustrate the importance of an employee's cooperation with his employer in this situation, the court of appeals noted that when DeGrace was discharged, his commander erroneously thought that the absence was due to physical illness that had not been verified because of DeGrace's failure to comply with the procedures for acquiring an authorized leave of absence.⁵⁴

Because of the various shortcomings in the findings of the district court, the court of appeals directed the lower court to decide on remand whether DeGrace's commander should have been aware of the racial misconduct of the employees and/or DeGrace's corresponding fear; whether the commander, assuming he was aware of the problem, *failed* to take reasonable measures to correct the situation; whether DeGrace would have reported to work but for his fear; and whether DeGrace acted reasonably under the circumstance.⁵⁵ An affirmative finding with respect to each of these issues would result in relief for DeGrace.

The DeGrace opinion evidences a judicial willingness to define broadly the section 2000e-16(a) relationship between racial discrimination and personnel actions. It interpreted 2000e-16(a) to proscribe not only employment decisions that are the direct product of racial discrimination but also those that arise indirectly from such discrimination, that is from the conduct of third parties not involved in the decisionmaking process. With this expansive approach comes a corresponding increase in an employer's potential liability under Title VII. Although the *DeGrace* court recognized that an employer cannot be required to guarantee a working environment free from any racial bias, the employer must "let it be known . . . that racial harassment will not be tolerated," and must "take all reasonable measures to enforce this policy."⁵⁶ The court, however, did not articulate specifically how much an employer must do to avoid liability.⁵⁷ Thus, an employer can be liable for a Title VII violation where he discharges an employee for reasons that are normally proper grounds for a discharge. To avoid such liability, the employer must demonstrate either

reasonable in the period before he informed the commander about the notes (November 19-December 21, 1974) or until January 4, 1975 when he stated he was not afraid to return to work.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 807, 21 FEP Cas. at 1451.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 805, 21 FEP Cas. at 1449.

⁵⁷ *Id.* at 807, 21 FEP Cas. at 1451.

that it was reasonable for him to be unaware of the racial misconduct of other employees, or that he took reasonable corrective measures. Even if he acted unreasonably, he could escape liability by showing that the worker's conduct, which formed the basis of the discharge, was an unreasonable response to the harassment by his coworkers.

Because the court of appeals did not specify the limits of its decision, it is conceivable that its holding could be applied to circumstances in which the employer would become responsible for the actions of third party non-employees under Title VII. For example, if non-employees harassed black employees on the employment premises, it seems clear that the *DeGrace* court would require the employer to take reasonable steps to correct the situation. The employer's responsibility, however, is less clear where such harassment occurs in a place other than the employment premises. If harassment took place in a location where the employee was required to go to perform his duties the employer well may be obligated to attempt to stop it under *DeGrace*. The further removed the harassment is from the workplace, however, the less reasonable it becomes for the employer to have a responsibility to prevent it under Title VII. Thus, if a black employee receives threatening letters regarding his employment at home from non-employees, there is probably little that the employer can do to assuage the situation. That non-employees are the harassing parties must enter into a determination both of what is reasonable for the employer to do and also of what is a reasonable response to the situation by the employee qua employee. An even more important aspect of the *DeGrace* decision lies in the court's application of the "but for" causation test of Title VII. The court cited the United States Supreme Court cases of *Mt. Healthy City Board of Education v. Doyle*⁵⁸ and *Givhan v. Western Line Consolidated School District*,⁵⁹ and the First Circuit decision of *Loeb v. Textron*⁶⁰ as authority for its use of a "but for" requirement. These cases employed the "but for" test to determine whether an employer's decision to terminate an employee was justified. Under the *Mt. Healthy* line of cases an employer's decision to terminate an employee violated section 2000e-16(a) if the discharge would not have occurred "but for" some direct act of discrimination on the employer's part.⁶¹ In

⁵⁸ 429 U.S. 274 (1977); see note 31 *supra*.

⁵⁹ 439 U.S. 410 (1979).

⁶⁰ 600 F.2d 1003 (1st Cir. 1979).

⁶¹ For the holding in *Mt. Healthy*, see note 31 *supra*. *Givhan* involved a fact situation similar to that of *Mt. Healthy*. In *Givhan*, a discharged teacher intervened in a desegregation action against respondent, claiming, *inter alia*, that her dismissal was based on her criticism of the school board, and, therefore, infringed upon her right of free speech under the first and fourteenth amendments. The court held that in order for the teacher to prevail, the district court must find that her criticism of the school board was not only the primary reason for her discharge, but that the board would not have discharged her "but for" her exercise of first amendment protected speech. 439 U.S. at 417. The *Givhan* Court cited the *Mt. Healthy* decision as support for the "but for" test. *Id.*

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the plaintiff-employee claimed that his discharge violated Title VII because it was based on age discrimination. The court required plaintiff to show that "but for" his employer's discriminatory intent, he would not have been dismissed. *Id.* at 1019. It is interesting to note that in *Loeb*, the employee was required to satisfy the "but for" causation requirement for recovery.

DeGrace, the court did not focus on the reasonableness of the employer's decision to discharge the employee but rather, on the reasonableness of the employees that lead to the discharge. The real issue before the court was whether firing an employee for his behavior was reasonable when the behavior might be a reasonable response to the racism of his fellow employees. Because the employee's conduct was at issue the *DeGrace* court subjected it, and not the employer's actions to the "but for" analysis. It required the employee to show that "but for" the fear reasonably resulting from the racial misconduct of his fellow employees, he would not have been absent.⁶² If *DeGrace*'s absence was shown to have resulted from the racial discrimination of his coworkers, then his supervisor's decision to discharge him was based indirectly on racial discrimination, and thus, in violation of Title VII.

The *DeGrace* court's use of the "but for" test to scrutinize an employee's, rather than the employer's, conduct is novel yet logical. As a means of establishing a Title VII violation, it is a fair approach to dealing with the statute. By broadly defining "personnel action . . . free from any discrimination," the court recognized that a personnel action may be tainted with discrimination although the employer acted without discriminatory intent. Thus, under the *DeGrace* court's approach, an employee need not show discriminatory intent on the part of his employer but may prove a Title VII violation by demonstrating that his own conduct, which admittedly was the basis for the employer's decision to discharge, would not have occurred "but for" the racial discrimination of his coworkers.

Prior to *DeGrace*, section 2000e-16a had been the source of the employer's affirmative duty to take reasonable steps to control and correct the racial misconduct of his employees.⁶³ In *DeGrace*, the court of appeals used this as its starting point. By interpreting section 2000e-16(a) to proscribe employment decisions based both on direct and indirect racial discrimination, the *DeGrace* court went further than its predecessors. The net result of its decision is that in addition to relying on an employer's duty to attempt to abate the racism of an employee's coworkers, the employee may take his own reasonable steps to cope with the situation. Since the employee is the target of such racism it seems fair that he be given some leeway in responding to it without jeopardizing his job status.

B. *Employer's Retaliatory Action: Monteiro v. Poole Silver Co.**

Section 704(a) of Title VII protects employees from retaliatory action for opposing an unlawful employment practice.¹ In pertinent part the section provides: "It shall be an unlawful employment practice for an employer to dis-

⁶² *DeGrace*, 614 F.2d at 805, 21 FEP Cas. at 1450.

⁶³ *Bell v. St. Regis Paper Co., Container Div.*, 425 F. Supp. 1126 (N.D. Ohio 1976).

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¹ 42 U.S.C. § 2000e-3(a) (1976). The section also protects employees from retaliatory action for participating in Title VII proceedings.

criminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . ."²

This clause, denominated the "opposition" clause,³ has been the object of considerable judicial debate with respect to its reach and meaning.⁴ One area of debate has been whether an employee must have only a reasonable belief that the practice which he opposes is a violation of Title VII or whether the practice opposed must in fact be a violation of Title VII in order for the employee's activities to be protected by section 704(a).⁵ Most courts have taken the position that it is sufficient that the person engaging in "opposition" behavior reasonably believes that the protested practice is illegal.⁶

During this *Survey* year, however, the First Circuit Court of Appeals in *Monteiro v. Poole Silver Co.*⁷ appears to have added a new element to be considered by the courts in determining whether the behavior in question is protected under section 704. The *Monteiro* court held that, where an employer's practice is not discriminatory in fact and the employee's accusations of discrimination do not result from a sincerely held belief that his employer was discriminating, the "opposition" clause does not protect the employee.⁸ The court noted that where both of these factors are present — no discrimination in fact and an insincere accusation of discrimination — it is immaterial whether the standard that an employee must meet to bring his conduct within the "opposition" clause is an objective "reasonable belief" standard or a subjective "conscientiously held" standard.⁹ Under a "reasonable belief" standard it is sufficient to make out a section 704 claim if a reasonable man standing in the plaintiff's position, on all the facts and circumstances present, would have believed that he had been the victim of discrimination.¹⁰ A subjective "conscientiously

² *Id.*

³ See *Hearth v. Metropolitan Transit Comm'n*, 436 F. Supp. 685, 687, 18 FEP Cas. 329, 330 (D. Minn. 1977).

⁴ There is little authority on the meaning of the clause or the scope of protection which it affords. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 341, 4 FEP Cas. 557, 581 (8th Cir. 1972). Courts, therefore, have concerned themselves with such questions as whether the practice opposed was in fact illegal, see, e.g., *Sias v. City Demonstration Agency*, 588 F.2d 692, 18 FEP Cas. 981 (9th Cir. 1978); *EEOC v. C & E Sportswear Corp.*, 398 F. Supp. 300, 10 FEP Cas. 1131 (M.D. Ga. 1975), whether ambiguous protest constitutes opposition, see *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 3 FEP Cas. 1007 (D. Utah 1971), and whether the form of expressing opposition strips the opposition of protection, see, e.g., *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 4 FEP Cas. 577 (1973); *Hochstadt v. Worcester Foundation*, 425 F. Supp. 318, 11 FEP Cas. 1426 (D. Mass. 1976), *aff'd*, 545 F.2d 222, 13 FEP Cas. 804 (1st Cir. 1976).

⁵ *Hearth v. Metropolitan Transit Comm'n*, 436 F. Supp. 685, 688, 18 FEP Cas. 329, 331 (D. Minn. 1977) (reasonable belief of employee sufficient); *accord*, *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 21 FEP Cas. 1012 (7th Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695-96, 18 FEP Cas. 981, 982-83 (9th Cir. 1978). *But see* *EEOC v. C & E Sportswear Corp.*, 398 F. Supp. 300, 10 FEP Cas. 1131 (M.D. Ga. 1975) (practice opposed must in fact be a violation of Title VII); *accord*, *Winsey v. Pace College*, 394 F. Supp. 1324, 1331, 10 FEP Cas. 829, 835 (S.D.N.Y. 1975).

⁶ See cases cited in note 5 *supra*.

⁷ 615 F.2d 4, 22 FEP Cas. 90 (1st Cir. 1980).

⁸ *Id.* at 8, 22 FEP Cas. at 92.

⁹ *Id.*

¹⁰ *Id.* at n.6.

held" standard, on the other hand, requires that it be shown that the plaintiff in fact believed, however unreasonable that belief, that he had been the victim of unlawful discrimination.¹¹ The significance of the decision is two-fold. First, the decision implicitly rejects the view that the protested practice must in fact be discriminatory in order to be protected under section 704. More significant, however, is the decision's implication that the reasonable belief standard, unless supplemented by the subjective standard requirement that the plaintiff's belief was honestly held, is also inadequate, for a determination that opposition behavior is within the scope of protection of section 704.

In *Monteiro*, the plaintiff, a black, began working for Poole as a "buffer" in 1958.¹² Five years later he voluntarily left Poole's employment because of his belief that his supervisor, Courcy, returned more work for rebuffing to black employees than to white employees.¹³ Shortly thereafter, Monteiro was rehired by Poole as a "buffer" at another of its plants and was given the unofficial title of "lead-man" of the department.¹⁴ In 1972 Monteiro was demoted as "lead-man," partly as a result of conflict with the then assistant manager Menzies.¹⁵ Because of the demotion, Monteiro filed charges with the Massachusetts Commission Against Discrimination (MCAD).¹⁶ A settlement resulted in which Monteiro was reinstated as lead-man subject to his adherence to certain rules and regulations contained in the settlement memorandum.¹⁷ These rules stated that Monteiro must maintain his position at his machine, must not roam about the plant at will, and must refrain from the "continuing use of the word 'discrimination.'" ¹⁸ In 1973 Monteiro again filed charges with the MCAD and the Equal Employment Opportunity Commission (EEOC).¹⁹ Before deposition of these charges, Courcy, Monteiro's former supervisor, was named supervisor at the Poole plant where Monteiro was employed.²⁰ Some months later Courcy and Monteiro became involved in a verbal fracas which led to Monteiro's discharge.²¹ The fracas, which lasted about thirty minutes, began when Courcy ordered Monteiro back to his work station.²² Monteiro responded that there were others away from their stations and that he was being

¹¹ *Id.* at n.5.

¹² *Id.* at 5, 22 FEP Cas. at 90.

¹³ *Id.* at 5-6, 22 FEP Cas. at 90. Because buffers were paid on a piecework basis, the amount of work returned would cause a reduction in the worker's wages. *Id.* at 6, 22 FEP Cas. at 90. The district court found, however, that the two workers who had the most work returned to them were white. *Id.*

¹⁴ *Id.* at 6, 22 FEP Cas. at 90.

¹⁵ *Id.* The district court found that Menzies was partly motivated by racial prejudice but that Poole neither practiced nor permitted racially discriminatory policies. *Id.* at n.2, 22 FEP Cas. at 90 n.2. In the instant action, Monteiro sought no remedy for this incident. *Id.*

¹⁶ *Id.* at 6, 22 FEP Cas. at 90. Monteiro also filed a grievance with the union. *Id.*

¹⁷ *Id.* 22 FEP Cas. at 90-91.

¹⁸ *Id.* 22 FEP Cas. at 91. The district court noted that while the last-mentioned rule was of questionable enforceability, it served to highlight the nature of the relationship between Monteiro and Poole. *Id.* at 6 n.3, 22 FEP Cas. at 91 n.3.

¹⁹ *Id.* at 6, 22 FEP Cas. at 91. The gravamen of the charges is not contained in the court's opinion.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 6-7, 22 FEP Cas. at 91.

harassed.²³ Courcy repeatedly ordered Monteiro to return to his station and stated that Monteiro's failure to do so was grounds for discharge.²⁴ After these exchanges, Monteiro accused Courcy of discrimination and was then told by Courcy that he was fired.²⁵

Following his dismissal, Monteiro filed another charge with the EEOC alleging, among other things, that he was discharged in retaliation for opposition to unlawful employment practices.²⁶ The EEOC's "Determination" found that Monteiro's charge of retaliatory discharge was not substantiated.²⁷ Monteiro then brought an action against Poole in district court claiming he had been discharged because of race.²⁸

The district court found that there was no discriminatory policy practiced or permitted by Poole; that Monteiro had failed to establish that his discharge resulted from racial prejudice; and that Monteiro had failed to show that he was terminated in retaliation for his opposition to unlawful employment practices.²⁹ With respect to its conclusion that the discharge was not the result of prohibited retaliation, the district court determined that although Monteiro's accusation of discrimination was a factor in bringing about the discharge, the discharge was essentially the result of Monteiro's challenge to Courcy's authority.³⁰ The court also rested its conclusion on Monteiro's failure to show that his accusation had been made in good faith.³¹ The district court observed that the "opposition" clause protects an employee who has a "conscientiously held belief" that there is racial discrimination.³² Here, however, according to the court, it was as likely that Monteiro's accusation was based on a belief that "the best defense to correction from the superintendent was a strong offense" as on a belief, conscientiously held, that discrimination existed.³³

On appeal, Monteiro challenged the district court's determination that his termination had not been retaliatory.³⁴ Relying on *Hearth v. Metropolitan Transit Commission*,³⁵ Monteiro contended that section 704(a) protects informal opposi-

²³ *Id.* at 6, 22 FEP Cas. at 91.

²⁴ *Id.* at 7, 22 FEP Cas. at 91.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* The EEOC "Determination" addressed all of Monteiro's allegations. It found reasonable cause to believe that Monteiro's earlier temporary demotion by his former supervisor was because of Monteiro's race. *Id.*

²⁸ *Id.* He also alleged that he had been discriminated against in other ways. *Id.* at 5, 22 FEP Cas. at 90. These are not specified in the opinion.

²⁹ *Id.*

³⁰ *Id.* at 7, 22 FEP Cas. at 92.

³¹ *Id.* at 8, 22 FEP Cas. at 92.

³² *Id.* at 7, 22 FEP Cas. at 92.

³³ *Id.*

³⁴ *Id.* at 5, 22 FEP Cas. at 90.

³⁵ *Hearth v. Metropolitan Transit Comm'n*, 436 F. Supp. 685, 18 FEP Cas. 329 (D. Minn. 1977). In *Hearth*, the plaintiffs, male bus drivers, brought action against their former employer, the Metropolitan Transit Commission (MTC), charging *inter alia* that they had been suspended by MTC in retaliation for their protests against MTC's enforcement of its dress code. *Id.* at 686, 18 FEP Cas. at 329-30. They contended that MTC's enforcement of its dress and grooming code was arbitrary and discriminatory because it was enforced only against some males and because female bus drivers were not required to conform to the same standards. *Id.* at 687, 18 FEP Cas. at 330. The court found that neither of these differences in enforcement constituted

tion by an employee who reasonably believes he has been the victim of discrimination.³⁶ He argued that section 704(a) is violated if a reasonable man in his position would have believed that he had been the victim of unlawful discrimination.³⁷ Therefore, he contended that the district court had erred in stating that an employee must have a conscientiously held belief that discrimination existed in order to be protected under section 704(a).³⁸

The First Circuit Court of Appeals rejected Monteiro's argument as inapposite to the issue at hand.³⁹ The sole issue before the *Hearth* court, according to the First Circuit court, was whether a plaintiff had to show that the employment practice opposed was in fact a Title VII violation.⁴⁰ Therefore, in ruling that the plaintiff need only have a reasonable belief that discrimination was being practiced, the *Hearth* court had merely held that opposition conduct did not lose its protected character solely because the alleged unlawful practice was later found to be lawful.⁴¹ The court of appeals stated that here, however, the district court's holding rested not only on the finding that Poole's actions were lawful but also on the finding that Monteiro's accusation was not made in good faith but was, in essence, a smokescreen.⁴² The issue before the lower court, therefore, was whether the protection of section 704(a) is available to one who makes insincere and unfounded claims of discrimination in order to excuse noncompliance with legitimate employer demands.⁴³ In considering this issue, the court of appeals drew an analogy to labor relations law, pointing out that concerted activities otherwise protected by section 7 of the National Labor Relations Act lose that protection when they are undertaken in bad faith.⁴⁴ Following from this, the court reasoned that when an employer's conduct is not

sex discrimination. *Id.* The court, nevertheless, concluded that despite the fact that the complaint of practices were not discriminatory, a claim under section 704(a) is viable so long as the employee had a reasonable belief that that which he opposed constituted prohibited discrimination. *Id.* at 688, 18 FEP Cas. at 331.

³⁶ 615 F.2d at 8, 22 FEP Cas. at 92.

³⁷ *Id.* at 91 n.6, 22 FEP Cas. at 92 n.6.

³⁸ *Id.* at 7-8, 22 FEP Cas. at 92.

³⁹ *Id.* at 8, 22 FEP Cas. at 92.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (citing *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 84 L.R.R.M. 2670 (1st Cir. 1973)). Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976), in pertinent part, 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. . . .

In determining whether employee activities are protected, a critical factor is whether the alleged grievances were pressed in good faith. *See, e.g., NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972) (conspiracy against an unpopular manager). The protection provided by the section is also lost if the concerted activity involves violence, *see, e.g., Carpenters Local 131 v. Cisco Constr. Co.*, 266 F.2d 365 (9th Cir.), *cert. denied*, 361 U.S. 828 (1959), gross insubordination, threats of physical harm, *see, e.g., NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972), or illegal activity, *see, e.g., NLRB v. Dallas Gen. Drivers, Warehousemen & Helpers, Local 745*, 264 F.2d 642 (5th Cir.), *cert. denied*, 361 U.S. 814 (1959).

discriminatory, the plaintiff must show that his opposition was in response to some "honestly held, if mistaken, feeling that discriminatory practices existed" in order to be protected by section 704(1).⁴⁵ In the court's view, when the employer's practice was not unlawful, the plaintiff is obliged to demonstrate that his belief was honestly held irrespective of whether a "reasonable belief" standard or a "conscientiously held" standard is applied.⁴⁶ Monteiro, however, had failed to do this.⁴⁷ Accordingly, the court of appeals affirmed the district court's finding that Poole's discharge of Monteiro was not a retaliatory action in violation of section 704(a).⁴⁸

The First Circuit court stated in *Monteiro* that it was unnecessary to its decision to adopt either the "reasonable belief" or the "conscientiously held" approach as the standard for determining whether an employee's conduct is protected by section 704(a) when the employer's challenged practice is lawful.⁴⁹ The inference to be drawn from this statement is that, when the appropriate opportunity is presented, the First Circuit will join with the majority of courts which have considered the question in rejecting the view that the protested practice must in fact be illegal in order for the employee's opposition conduct to enjoy the protection of section 704(a).⁵⁰ The majority view appears to be sound. It seems logical to assume that appropriate informal opposition to perceived discrimination would be chilled by the threat of retaliatory action in the event that the protested practice is not illegal.⁵¹ Moreover, the informal resolution of such charges should be encouraged.⁵² The alternative means of resolution provided by Title VII, the filing of formal charges with the EEOC⁵³ or the initiation of private suit,⁵⁴ may well be avoided through informal communication between an employee and his employer. Finally, elimination of employment discrimination is the purpose behind Title VII.⁵⁵ For this reason, the statute should be liberally construed.⁵⁶

Although the First Circuit's implicit refusal to require that the protested

⁴⁵ 615 F.2d at 8, 22 FEP Cas. at 92.

⁴⁶ *Id.*

⁴⁷ *Id.*, 22 FEP Cas. at 92-93.

⁴⁸ *Id.* at 89, 22 FEP Cas. at 93.

⁴⁹ *Id.* at 8 n.5, 22 FEP Cas. at 92 n.5. It should be noted that not all activity is protected by the "opposition" clause. Courts have looked to the propriety of the form of the opposition activity. For example, illegal activity is not protected. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 341, 4 FEP Cas. 577, 581 (8th Cir. 1973). Opposition activity which is too disruptive is also not protected. *Hockstadt v. Worcester Foundation*, 415 F. Supp. 318, 11 FEP Cas. 1426 (D. Mass. 1976), *aff'd*, 545 F.2d 222, 13 FEP Cas. 804 (1st Cir. 1976) (constant complaining; circulating rumors; disclosing confidential information to newspaper).

⁵⁰ See, e.g., *Sias v. City Demonstration Agency*, 588 F.2d 692, 18 FEP Cas. 981 (9th Cir. 1978); *Hearth v. Metropolitan Transit Comm'n*, 436 F. Supp. 685, 18 FEP Cas. 329 (D. Minn. 1977).

⁵¹ *Hearth v. Metropolitan Transit Comm'n*, 436 F. Supp. 685, 688, 18 FEP Cas. 329, 331 (D. Minn. 1977).

⁵² *Id.* at 668-89, 18 FEP Cas. at 331.

⁵³ 42 U.S.C. § 2000e-5(b) (1976).

⁵⁴ 42 U.S.C. § 2000e-5(f)(1) (1976).

⁵⁵ *Hearth v. Metropolitan Transit Comm'n*, 436 F. Supp. 685, 689, 18 FEP Cas. 328, 331 (D. Minn. 1977).

⁵⁶ *Id.*

practice be illegal for the protection of section 704(a) to be triggered is in keeping with the weight of authority, the First Circuit's introduction of what is essentially a good faith requirement as a factor to be considered in section 704 actions is novel.⁵⁷ The Ninth Circuit and the Seventh Circuit, the only other appeals courts yet to rule on whether the protested practice must be illegal, have adopted the objective reasonable belief standard. As noted earlier, the First Circuit left open whether it would adopt an objective "reasonable belief" standard or a subjective "conscientiously held" standard to determine whether conduct is protected when the employer's activity is lawful. Significantly, however, *Monteiro* suggests that, even if the First Circuit ultimately joins the Ninth Circuit⁵⁸ and the Seventh Circuit⁵⁹ in adopting the reasonable belief approach, the First Circuit will require in addition that the plaintiff demonstrate his good faith in order to prevail in a section 704(a) action. This would mean that a First Circuit plaintiff would have to demonstrate both that he sincerely believed that he was the victim of discrimination and that a reasonable person in his position reasonably would have so believed. In a circuit which follows the "reasonable belief" standard alone the plaintiff would be called upon to show only that on all the facts and circumstances a reasonable person would have believed that discrimination was being practiced against him.

The First Circuit's indication in *Monteiro* that it is disinclined to accept the "reasonable belief" standard at all is as interesting and significant as the possibility that the First Circuit would require that the "reasonable belief" approach be supplemented by a "conscientiously held" good faith requirement. The opinion suggests that the First Circuit favors the subjective "conscientiously held" approach. In a footnote the court noted that this standard affords more protection to an employee than the reasonable belief standard because it protects the activity of an employee who unreasonably but honestly believes that the employer is practicing unlawful discrimination.⁶⁰ If the First Circuit adopts this approach it will be the first to do so.⁶¹ Presumably, the effect of such a decision would be that the First Circuit plaintiff would be required to show only that he sincerely believed that the practice he opposed was illegal in order to maintain a section 704(a) action. The *Monteiro* holding, in short, would become the governing standard in determining whether an employee's conduct is protected from retaliation when the employer's practice is found to be lawful.

Whether the First Circuit ultimately adopts a "reasonable belief" stand-

⁵⁷ One court, utilizing the objective "reasonable belief" approach achieved the same result as would be arrived at using a subjective "conscientiously held" standard. On the basis of the facts of the case the court concluded that it could be inferred that the employee knew that her employment was in jeopardy because of her inadequate job performance and personal difficulties. Knowing the true reasons for her employment problems, she nevertheless brought a suit under section 704(a) in an attempt to use the sex discrimination laws as a shield to her employer's termination action. *EEOC v. Johnson Co.*, 18 FEP Cas. 896, 903 (D. Minn. 1978).

⁵⁸ *Sias v. City Demonstration Agency*, 588 F.2d 692, 695, 18 FEP Cas. 981, 982-83 (9th Cir. 1978).

⁵⁹ *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1045, 21 FEP Cas. 1012, 1015-16 (7th Cir. 1980).

⁶⁰ 615 F.2d at 8 n.5, 22 FEP Cas. at 92 n.5. The court did not address which party would bear the burden of proof under a subjective approach.

⁶¹ See note 57 *supra*.

ard supplemented by a "conscientiously held" standard or simply a "conscientiously held" standard, its introduction of this good faith element by either means is not inconsistent with the purpose of Title VII. As noted earlier, that purpose is the elimination of employment discrimination.⁶² When there is no unlawful discrimination in fact, however, effectuation of the act's purpose is not aided by allowing the protection of section 704(a) to an employee who does not sincerely believe that the policy or practice in question is discriminatory even if a reasonable person in the employee's position would so believe. To provide protection through section 704 in these circumstances would be to allow the Act's remedial purpose to be subverted for personal motives and benefit. No end consonant with Title VII's purpose is served by allowing one who knows that the employer's practice is lawful to use the protection of section 704(a) as a sword against compliance with the employer's legitimate demands or as a means of disrupting the employer's place of business.

Despite this value as a prophylactic measure, however, the use of the subjective approach, whether alone or in conjunction with the reasonable belief approach, has some drawbacks. Its primary disadvantage is that it requires a court to determine the employee's intent in engaging in the opposition. In addition, the subjective approach can lead to a situation where identical acts may be protected under section 704(a) in one case but unprotected in another. The primary benefit of the objective approach, on the other hand, is that it avoids this necessity of probing the employee's state of mind. Since the subjective test is used successfully in other contexts,⁶³ however, these practical problems do not seem of sufficient magnitude to outweigh its benefits. Such an approach extends section 704 protection to the employee who sincerely but unreasonably believes his employer is unlawfully discriminating, minimizes misuse of Title VII for illicit personal benefit, and reduces the possibility of successful use of the Act for unfounded disruption of the employer's business. Because the subjective approach offers these advantages, the First Circuit's approach in *Monteiro* is defensible and desirable.

C. *Seniority Systems*: California Brewers Association v. Bryant*

Title VII of the Civil Rights Act of 1964¹ prohibits practices, procedures, or tests that operate to " 'freeze' the status quo of prior discriminatory employment practices."² Seniority systems, however, are exempted from this prohibition by section 703(h). This exemption permits an employer to use different standards of compensation and other employment benefits where such differences are based on a seniority or merit system.³ The exemption is not available where such differences arise out of the employer's intent to discriminate on ac-

⁶² See text at note 55 *supra*.

⁶³ See, e.g., *St. Amant v. Thompson*, 390 U.S. 727 (1968) (defamation); *St. Joseph Hosp. v. Corbetta Constr. Co.*, 21 Ill. App. 3d 925, 316 N.E.2d 51 (1975) (fraud).

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¹ Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1976).

² *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

³ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1976).

count of race.⁴ In *International Brotherhood of Teamsters v. United States*,⁵ the Supreme Court of the United States interpreted this exception as intended to "make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII . . . even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes."⁶ Title VII does not define "seniority system" nor is this term defined by legislative history.⁷ In the *Survey* year decision of *California Brewers Association v. Bryant*,⁸ however, the Supreme Court for the first time undertook to define "seniority system" as used in section 703(h).

In *Bryant* the respondent challenged the purported "seniority system" contained in the multi-employer collective bargaining agreement between the California Brewers Association and the Teamsters.⁹ This system operated by defining permanent, temporary, and new employees and by articulating the rights of each employee class regarding hiring and lay-offs.¹⁰ Respondent claimed, *inter alia*, that the agreement's requirement that an employee work forty-five weeks in a calendar year in order to acquire permanent status barred him and the members of his putative class from achieving, or from having a reasonable opportunity to achieve, permanent status.¹¹ Therefore, respondent argued, the forty-five-week rule perpetuated historical racial discrimination.¹²

The District Court for the Northern District of California dismissed the complaint for failing to state a claim on which relief could be granted.¹³ Although no opinion accompanied this order the court's decision probably rested on its conclusion that the rule was part of a bona fide seniority system. The Ninth Circuit Court of Appeals reversed this decision,¹⁴ ruling that the forty-five-week provision was not a seniority system nor was it a part of one within the meaning of Title VII.¹⁵ The court of appeals reasoned that to qualify as a seniority system, the forty-five-week rule would have to provide for an in-

⁴ *Id.*

⁵ 431 U.S. 324 (1977).

⁶ *Id.* at 352.

⁷ See 110 CONG. REC. 1518, 5423, 7207, 7213, 7217, 12723 (1964).

⁸ 444 U.S. 598 (1980).

⁹ *Id.* at 600-01.

¹⁰ *Id.* at 602-03. Respondent had been employed intermittently by one of the petitioners, the Falstaff Brewing Corporation, since 1968. Because he had not worked more than 45 weeks in any one calendar year, he had never qualified as a permanent employee under the terms of the multi-employer collective bargaining agreement between the California Brewers Association (the petitioner brewing companies) and the Teamsters Brewery and Soft Drink Workers Joint Board of California (the defendant-employee unions). *Id.* at 601-02.

¹¹ *Id.* at 602.

¹² *Id.* at 601-02. Respondent brought this suit as a class action on behalf of himself and other Negroes similarly situated against petitioner and several unions. He filed a complaint in the United States District Court for the Northern District of California alleging that defendants had discriminated against the putative class in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and of 42 U.S.C. § 1981. *Id.* at 601. The complaint also asserted under 29 U.S.C. §§ 159 & 185 that the defendant unions had breached their duty by, among other things, the negotiation of unreasonable privileges for some employees and not others. *Id.* at 601 n.3. The Supreme Court, however, considered only the Title VII claim. *Id.*

¹³ This decision is unreported. See 444 U.S. at 601.

¹⁴ *Bryant v. California Brewers Ass'n*, 585 F.2d 421 (9th Cir. 1978).

¹⁵ *Id.* at 427.

crease in employment rights as the duration of employment increased.¹⁶ The rule, however, did not achieve this end since employees would be terminated shortly before completing a forty-five-week period of employment. They subsequently would be rehired and the forty-five-week period would begin to run anew. Consequently, employees could work for great lengths of time while never satisfying the forty-five-week requirement. Thus the rule effectively barred many long term employees from attaining permanent work status.¹⁷ The court, therefore, characterized the rule as "simply a classification device to determine who enters the permanent employee seniority line" and it concluded that "this function does not make the rule part of a seniority system."¹⁸ It remanded the case to the district court for trial to determine whether the forty-five-week standard had a discriminatory impact on blacks.

The Supreme Court granted certiorari¹⁹ to determine the scope of the seniority system exception under Title VII of the Civil Rights Act of 1964. In deciding whether the forty-five-week provision qualified as a seniority system, the Court found it necessary to define the term "seniority system" within the meaning of Title VII. To do so, it relied upon "commonly accepted notions about 'seniority' in industrial relations"²⁰ and considered such concepts in light of Title VII and national labor policy.²¹ It noted first that "seniority" connotes length of employment and that a "seniority system" conditions improved employment rights and benefits upon increased lengths of employment.²² Thus, the Court agreed with the court of appeals that the essential element of a seniority system is the enhancement of employment rights as a function of an increase in employment duration.

Unlike the court of appeals, however, the Supreme Court held that seniority systems could encompass provisions that would not in themselves provide for increased benefits based on the length of employment,²³ provided such rules were necessary to make the system as a whole function.²⁴ The Court characterized the forty-five-week requirement as such a rule.

The Court supported its rather flexible delineation of Title VII's use of the term "seniority system" with a cursory examination of the nation's labor policy. It observed that the structure of a particular seniority system is the product of the collective bargaining process in a particular business or industry.²⁵ As a result, it must be expected that the characteristics of seniority systems will vary depending on the parties to the agreement.²⁶ The Court con-

¹⁶ *Id.* at 426.

¹⁷ *Id.* at 426-27.

¹⁸ *Id.* at 427 n.11.

¹⁹ 442 U.S. 916 (1979).

²⁰ 444 U.S. at 605.

²¹ *Id.*

²² *Id.* at 605-06.

²³ *Id.* at 606-07.

²⁴ *Id.* at 607-08. For example, such rules could define the types of employment conditions that would be affected by seniority and set out the circumstances under which seniority would be forfeited.

²⁵ *Id.* at 608.

²⁶ *Id.*

cluded that section 703(h) is not intended to prefer any particular type of seniority system over another.²⁷

The Court tempered its malleable interpretation of a section 703(h) seniority system by stating that employment rules that "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system" cannot qualify for the section 703(h) exception merely by being labeled as part of a seniority system.²⁸ It implied that section 703(h) only applies to those employment rules that clearly are based on length of employment and to those rules that, though not directly time-related, are necessary to make the seniority system work.²⁹ Thus, in the Court's view, a threshold requirement for entering a seniority tract that has no direct or indirect relation to durational considerations cannot qualify for a section 703(h) exemption.³⁰

Applying these principles to the facts of this case, the Court found that the agreement created two parallel seniority tracts, one for temporary employees and another for permanent employees.³¹ The Court characterized the forty-five-week provision as defining the threshold qualification required to enter the permanent employee seniority track.³² Because this provision focused on length of employment, the Court found it to be a component of a seniority system within the meaning of section 703(h).³³ Accordingly, the Court reversed the court of appeals and held that the forty-five-week rule was a part of a section 703(h) seniority system.³⁴ It noted, however, that on remand to the district court, respondent still could invalidate the rule if it could show either that the seniority system established by the agreement was not "bona fide," or that the differences in employment conditions attributable to the agreement were the product of international racial discrimination within the meaning of section 703(h).³⁵

Justice Marshall, joined by Justices Brennan and Blackmun, dissented, finding the majority's opinion inconsistent with the purposes and intent of section 703(h).³⁶ He agreed with the Court that a seniority system is "a scheme that, alone or in tandem with non-'seniority' criteria allots to employees ever imposing employment rights and benefits as their relative lengths of pertinent employment increase." ³⁷ He maintained, however, that the forty-five-week rule was not a bona fide element of a permissible seniority system because it operated to prevent certain employees from acquiring improved rights and

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 608-09. The Court mentioned educational pre-requisites, physical or aptitude tests, and "subjective standards" as examples of threshold requirements that bear no direct or indirect relation to the duration of employment. *Id.* at 609-10.

³¹ *Id.*

³² *Id.* at 609.

³³ *Id.*

³⁴ *Id.* at 610-11.

³⁵ *Id.*

³⁶ *Id.* Justice Powell and Stevens took no part in the consideration or decision of this case.

³⁷ *Id.* at 614 (quoting majority opinion at 605-06).

benefits as their length of service increased.³⁸ Justice Marshall noted that because the industry was seasonal and because a temporary employee easily could be replaced by a permanent employee or otherwise laid-off, the forty-five-week rule did not focus on time, but on circumstances beyond the employee's control.³⁹ Since the forty-five-week provision functioned in this manner, Justice Marshall found it at odds with common notions of seniority and, therefore, not a part of a section 703(h) seniority system.⁴⁰

Justice Marshall's opinion reflects a concern that the forty-five-week rule easily could be abused by employers desiring to keep minorities out of permanent positions. Although it reached an opposite result, the Court, to some extent shared this concern. The majority observed that freedom of collective bargaining must not be allowed to sweep within the ambit of section 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority.⁴¹ Competing with this concern, however, was the Court's determination to leave unfettered the freedom of employers and unions to design differing seniority systems through collective bargaining. The Court correctly reconciled the need for this freedom with the dangers of abusing the 703(h) exemption by a loosely defining seniority system. In doing so, it implicitly recognized that checks on such abuse are not to be imposed by limiting definitions but are to be found instead in section 703(h)'s prescription of "seniority systems" which are not "bona fide" and which are the product of racial discrimination. In sum, the decision provided employers and unions with general guidelines for determining what may and may not be included in a section 703(h) seniority system, while maintaining freedom of collective bargaining to the fullest extent possible.

The majority's opinion leaves open two avenues of attack on provisions that allegedly are not within the section 703(h) exemption. First, it may be argued that the rule or provision does not conform to commonly accepted notions of seniority because it does not focus on the enhancement of employee privileges conditioned by the length of employment because it gives effect to subjective qualifications.⁴² It was this argument that was advanced by respondent in *Bryant*, but it failed since the Court found that the challenged provisions did condition employment benefits on the length of employment. The Court expressly noted, however, that a second line of argument remained available to respondent on remand.⁴³ Thus, if a rule is found to constitute a seniority provision, it may be asserted that the rule does not comply with the section 703(h) requirement that the seniority system be bona fide and without racial intent to qualify for the exemption.

³⁸ *Id.* at 615.

³⁹ *Id.*

⁴⁰ *Id.* at 615-16.

⁴¹ *Id.* at 609.

⁴² The majority and the dissenters agree that educational and physical standards or tests are "subjective" criteria while the length of employment is "objective." *Id.* at 609, 618.

⁴³ *Id.* at 610-11.

Consequently, Justice Marshall's concern that the forty-five-week rule was an abuse of the exemption might be alleviated by respondent's showing that even though the rule is a component of a seniority system, it nevertheless is employed to perpetuate intentional racial discrimination. Such a showing would preclude the characterization of the seniority system as "bona fide" within the meaning of section 703(h) and bar the availability of the exemption. Because respondent in *Bryant* had not advanced this argument, there was no finding before the Court as to whether the termination of temporary employees shortly before the completion of a forty-five-week period was the product of intentional racial discrimination or the result of a seasonal demand for labor in the California brewing industry.

The adequacy of the Court's delineation of the scope of the seniority system exemption can be determined only by more litigation. Through the interpretation and application of the holding in *Bryant*, it will become evident whether the Court's safeguards are sufficient to prevent Justice Marshall's concerns from becoming a reality.

III. DISCRIMINATION IN SKILLED AND UNSKILLED POSITIONS

A. *Qualifications for Unskilled Labor*: Holder v. Old Ben Coal Co.*

In a Title VII¹ action, the plaintiff must carry the initial burden of establishing a prima facie case of sex discrimination. This may be done, in part, by showing that the plaintiff was qualified for the position sought.² It is clear that when an employer seeks applicants for a skilled position for which there are minimum objective qualifications, the plaintiff must show that she has met these standards. When the employer, however, seeks applicants for an unskilled position for which there are no articulated requirements, the question arises whether a plaintiff must show he is qualified for an unskilled job in order to establish a prima facie case of discrimination in accordance with the standard of proof enunciated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.³ The standards laid down by the Court in *McDonnell Douglas* places the initial burden of establishing a prima facie case of discrimination with the complainant.⁴ Once this step has been completed the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions.⁵ Lastly, once the defendant-employer has convinced the court of the legitimacy of its

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¹ 42 U.S.C. § 2000e et. seq. (1976).

² In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Supreme Court described the initial burden of proof which a plaintiff must meet in an employment discrimination case. The complainant in a Title VII suit must carry the initial burden of proof by establishing a prima facie case of racial discrimination. This may be done by showing (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 for the job; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

³ 411 U.S. 792, 802 (1973).

⁴ *Id.*

⁵ *Id.*

reasons, the plaintiff has the burden of proving that the defendant's articulated base were in fact pretext.⁶

During the *Survey* year, the United States Court of Appeals for the Seventh Circuit determined whether the term "unskilled" meant a total lack of qualifications. In *Holder v. Old Ben Coal Co.*,⁷ the court of appeals held that "unskilled" does not mean unqualified,⁸ but rather it means not skilled in a particular handicraft or lacking technical training.⁹ According to the court, an unskilled position may require specific qualifications, and consistent with its definition of "unskilled," the court of appeals also held that a plaintiff, to establish a prima facie case, must prove herself qualified, even for an unskilled position.¹⁰

The plaintiff in *Old Ben* submitted three applications for an unskilled position at the defendant's coal mine.¹¹ Unskilled positions, such as the one plaintiff applied for, were neither advertised by defendant nor described by the collective bargaining agreement as requiring any particular qualifications.¹² The unskilled category merely indicated that the defendant did not require any technical skills for the position.¹³ For the skilled positions that it offered, defendant sought only those persons with a minimum of six months experience in one of the listed skill areas.¹⁴ The plaintiff's first two applications indicated that she had attended high school and a beauty college from which she graduated with a degree.¹⁵ Her employment record consisted of eleven years of experience as a beautician and light work in a factory during one winter.¹⁶ The plaintiff's third application was notably different than the prior two.¹⁷ By the time she filed this application she had been hired by another coal mine and had accumulated sixteen months of work experience.¹⁸ She was hired by defendant on the basis of this application and remains an employee of defendant's coal mining company.¹⁹ The plaintiff brought this suit under Title VII of the Civil Rights Act,²⁰ contending that Old Ben Coal Company had discriminated against her

⁶ *Id.*

⁷ *Holder v. Old Ben Coal Co.*, 618 F.2d 1198, 21 FEP Cas. 1462 (7th Cir. 1980).

⁸ *Id.* at 1201, 21 FEP Cas. 1464.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1200, 21 FEP Cas. at 1463.

¹² *Id.* at 1201, 21 FEP Cas. at 1464.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1200, 21 FEP Cas. at 1463.

¹⁶ *Id.* A dispute arose whether the plaintiff's first application mentioned prior truck driving experience. *Id.* The plaintiff insisted that she had noted four months of such experience. *Id.* The personnel administrator of the mine denied that any mention was made of her truck driving. *Id.* No reference was made on either of the two subsequent applications. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1200, 21 FEP Cas. at 1463-64.

²⁰ 42 U.S.C. § 2002-2 (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, con-

on the basis of sex in its failure to hire her on the first two applications.²¹ She sought back pay, seniority, pension credits and her legal costs attendant with the action.²²

The United States District Court for the Southern District of Indiana concluded that the plaintiff had not proven a case of sex discrimination and dismissed her action.²³ The district court judge applied the burden of proof formula set out in *McDonnell Douglas*. Specifically, the court maintained that the plaintiff had failed to prove that she was qualified for an unskilled position at defendant's mine at the time she was rejected for employment.²⁴

The Court of Appeals for the Seventh Circuit affirmed the lower court's decision.²⁵ The plaintiff argued on appeal that she had satisfied her initial burden of proof and thus the district court had erred in dismissing her case.²⁶ In support of her argument that she had established a *prima facie* case, plaintiff noted that she had applied for an "unskilled" position.²⁷ Plaintiff then claimed that unskilled meant that the job did not require any qualifications and thus she was necessarily capable of doing any unskilled job.²⁸ The court of appeals rejected her definition of the term "unskilled," insisting that unskilled does not connote an absolute lack of qualifications.²⁹ According to the majority, the term "unskilled" is merely a label which indicates that an employer does not require technical skills as a prerequisite for being hired.³⁰ Thus, an employer may still hire on the basis of work experience and non-technical qualifications, even when filling an "unskilled" position.³¹ The record revealed that defendant consistently sought the most experienced worker to fill those positions from which plaintiff was rejected.³² The court refused to brand the defendant's actions as discriminatory simply because the employer did not necessarily consider all applicants for unskilled positions to be equally qualified. According to the court, there is nothing in Title VII, that requires an employer to hire a woman over more qualified individuals whether the position sought is skilled or unskilled.³³

ditions, 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 or national origin.

Id.

²¹ 618 F.2d at 1198, 21 FEP Cas. at 1462.

²² *Id.* at 1199, 21 FEP Cas. at 1462-63.

²³ *Id.* at 1200, 21 FEP Cas. at 1463.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1201, 21 FEP Cas. at 1464.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1202, 21 FEP Cas. at 1465.

Plaintiff based her appeal on the contention that "unskilled" meant that the job did not require any qualifications.³⁴ Plaintiff reasoned that since she had sought an "unskilled" job, she automatically established a prima facie case that she was qualified for the position sought.³⁵ Plaintiff also argued that the court had confused the burden of proof standard enunciated in *McDonnell Douglas* which requires a complainant to establish a prima facie case.³⁶ Specifically, plaintiff contended that she should not have to prove job experience or comparable qualifications³⁷ in establishing a prima facie case since the job itself requires no qualifications. Rather, showing a relative lack of work experience should be part of defendant's rebuttal since hiring an experienced applicant is a matter of personal preference and not of necessity.³⁸ The court of appeals rejected plaintiff's contention by stating that plaintiff must show that she did not have an absolute or relative lack of qualifications even though an unskilled job is involved.³⁹ In concluding that it is a plaintiff's burden to show that she is more experienced and better qualified for an "unskilled" position, the court of appeals distinguished its earlier decision in *Davis v. Wiedner*⁴⁰ which the dissenting judge held controlling.⁴¹ The court of appeals interpreted the *Davis* decision as holding that the plaintiff did not have to show as part of her prima facie case that she was as qualified as those retained on the job.⁴² The *Davis* court also stated that what a plaintiff must show in her prima facie case varies with respect to the factual circumstances.⁴³ Thus, in distinguishing the holding in *Davis*, the *Old Ben* court focused on the factual distinctions between the two cases.⁴⁴ The judgment not to retain the plaintiff in *Davis* as a member of the nontenured faculty was a subjective one based on information not visible to plaintiff and in the sole possession of the defendant. The court reasoned that it therefore made sense to require the employer to establish that the plaintiff was relatively less qualified. In contrast, the defendant in *Old Ben* based its hiring

³⁴ *Id.* at 1201, 21 FEP Cas. at 1464.

³⁵ *Id.*

³⁶ *Id.* at 1202, 21 FEP Cas. at 1465.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 1202, 21 FEP Cas. at 1465. In arriving at this conclusion, the court of appeals relied on *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), in which the Supreme Court stated that the *McDonnell Douglas* formula of a prima facie case is to be flexibly applied. *Id.* at 358. In applying this language the Court stated that a Title VII plaintiff must show that her rejection did not result from "the two most common legitimate reasons on which an employer might rely to reject a job applicant." *Id.* One of these reasons is the absolute and relative lack of qualifications. *Id.* The other is the absence of a vacancy in the job sought. *Id.*

⁴⁰ 596 F.2d 726, 19 FEP Cas. 668 (7th Cir. 1979). The employer in *Davis* asserted that the plaintiff there was not as qualified as the other applicants for a faculty position at the university. The employer further contended that an additional element for establishing a prima facie case of employment discrimination be that plaintiff's rejection did not result from a relative lack of qualifications. 596 F.2d at 730, 19 FEP Cas. at 671. The *Davis* court held that the plaintiff had made a prima facie case. *Id.* The court also stated that showing that the plaintiff had a relative lack of qualifications was part of the employer's burden of proof. *Id.*

⁴¹ 618 F.2d at 1203, 21 FEP Cas. at 1466.

⁴² *Id.* at 1202 n.5, 21 FEP Cas. at 1465 n.5.

⁴³ *Id.*

⁴⁴ *Id.*

decisions on the mining-related experience of the applicants.⁴⁵ The court maintained that since the mining experience of those hired was obvious from the applications which were available to plaintiff, there was no reason to excuse plaintiff from showing that she was as qualified as those hired.⁴⁶ Having concluded that plaintiff failed to show that she was qualified for the job, the court of appeals held that plaintiff failed to establish a *prima facie* case.⁴⁷

The dissenting judge in *Old Ben* stated that plaintiff had met her burden of proof since she had proven that she possessed the qualifications required by the employer for an unskilled position.⁴⁸ The burden should then shift to the defendant to present his legitimate business reasons for hiring male applicants instead of the plaintiff.⁴⁹ The dissent emphasized the importance of distinguishing between explicit job qualifications and legitimate employer preferences.⁵⁰ According to the dissent, unless a plaintiff can initially show that she is qualified for the job sought, the burden will never fall on the defendant to justify his actions.⁵¹ The dissent also noted that the critical difference between qualifications and preferences is that qualifications must be uniform for all applicants whereas preferences are applied according to the employer's discretion.⁵² The dissenting judge warned that if courts permit an applicant to be labelled "unqualified" because she does not possess a preferred quality that is not demanded of all applicants, the plaintiff's burden will never be met.⁵³ The dissent maintained that this is the situation which the majority created by characterizing work experience as a qualification for an unskilled position.⁵⁴ The dissent believed that had the court distinguished between qualifications and legitimate preferences it could have concluded that plaintiff had established a *prima facie* case. The dissent noted that *Old Ben* had not announced any requirements or qualifications for the unskilled job for which plaintiff sought to be hired.⁵⁵ Experience with heavy machinery was merely a job preference, not a necessity. The dissent then concluded that the plaintiff should therefore not have been required to prove she had mining experience in order to prove she was qualified for the job.⁵⁶ According to the dissent, plaintiff was qualified for the unskilled job and therefore met her burden of establishing a *prima facie* case.⁵⁷ The burden would then shift to defendant *Old Ben* to establish in its rebuttal of plaintiff's *prima facie* case that those hired were more experienced.⁵⁸ The focus of the court would then be on whether defendant had met that burden.⁵⁹

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1203, 21 FEP Cas. at 1466.

⁴⁸ *Id.* (Swygert, J., dissenting).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1204, 21 FEP Cas. at 1467.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

The dissenting judge concluded that mining experience was not a requirement for employment in an unskilled position.⁶⁰ In arriving at this conclusion, the dissent relied on the testimony of the defendant's personnel administrator. This witness conceded that experience was a basis for selection only if it was available.⁶¹ If no applicant had this experience, an applicant without it would be hired.⁶² Mining experience, the dissent argued, was therefore not a minimum job qualification for the unskilled position sought by the plaintiff.⁶³

The dissent then turned to *Davis v. Weidner*⁶⁴ which had recently been decided by that court. *Davis* was interpreted by the dissent as stating that legitimate employer preferences are not part of the plaintiff's prima facie case.⁶⁵ In *Davis*, the court concluded that the plaintiff had proven that she was qualified.⁶⁶ Thus, the burden of showing her relative lack of qualifications was to be placed on the defendant.⁶⁷ The dissent analogized *Davis* to the facts in *Old Ben*, concluding that a discussion of the plaintiff's relative lack of mining-related qualifications and experience was unrelated to her prima facie case.

It is submitted that the position advanced by the majority is unsound. As the dissent noted, the majority's holding blurs the distinction between job qualifications and legitimate employer preferences, thereby making the plaintiff's initial burden an onerous one. Under the *Old Ben* decision an employer can apply legitimate preferences to one applicant and not another while the plaintiff must still prove that she satisfies such "qualifications" to establish a prima facie case. Qualifications must be uniform for all applicants; otherwise so-called qualifications could be required at the mere discretion of the employer, perhaps depending on illegitimate criteria such as the sex of the applicant. In *Old Ben*, the employer did not require any particular qualifications for its unskilled jobs. Yet the majority still maintained that in the area of unskilled employment, the employer's preference for mining experience constituted a job qualification.

The significance of the decision in *Old Ben* lies with the court's refusal to distinguish between job requirements or qualifications and legitimate employer preferences. The danger in making a preference analogous to a qualification is that preferences may be applied at the whim of the employer. Consequently, it will be extremely difficult for the plaintiff to show with certainty whether she was in fact qualified since the notion of qualification under the *Old Ben* decision will necessarily include elements of an employer's discretion. Furthermore, a person seeking employment in an unskilled position may find their efforts frustrated under *Old Ben*. In *Old Ben*, the defendant announced no requirements or qualifications for the unskilled position and yet the court held that an applicant's prior mining experience was in fact a qualification for the job. In effect, the court's ruling permits employers to advertise vacancies for

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 596 F.2d 726, 19 FEP Cas. 668 (7th Cir. 1979).

⁶⁵ 618 F.2d at 1203, 21 FEP Cas. at 1466.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1204, 21 FEP Cas. at 1466-67.

unskilled jobs without announcing the basic employment qualifications which they are actually considering. An applicant for an unskilled position may have no prior idea of what employers are requiring and thus, the individual cannot make an informed decision as to which jobs she should apply for. The dissent, however, argued that if no qualifications are announced by the employer that would mean that there in fact are no requirements. Thus, everyone would be qualified for such an unskilled position and applicants would know in advance whether they are suited for the job.

B. *Use of General Statistical Comparisons in Title VII
Litigation Involving Skilled Positions:*

EEOC v. Radiator Specialty Co.¹ and Davis v. Califano^{2*}

Statistical evidence has achieved widespread use by Title VII³ plaintiffs to establish a prima facie case of discrimination.⁴ If the plaintiff demonstrates a significant statistical disparity between the composition of the defendant's work force and that of the relevant labor market,⁵ thus creating an inference of discrimination against an under-represented class, he is said to have made out a prima facie case.⁶ The defendant must then produce evidence to rebut the inference that illegal discrimination has occurred. This use of statistical evidence by Title VII plaintiffs has been justified on the basis that claims of employment discrimination are frequently difficult to prove because most, if not all, employment information is in the hands of the defendant. The difficulty of proof is amplified when, as is often true, employment decisions are made subjectively, rather than being based on objective criteria.⁷ Given the difficulty of proving discrimination, the use of statistical evidence provides the plaintiff with one of the only means of showing the court that he was a victim of discrimination.

Although courts have uniformly allowed statistical evidence in Title VII actions, they have struggled to define its proper role. One problem encountered by the judiciary has been to determine the appropriate use of general population statistics in discrimination cases involving jobs requiring special

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¹ 610 F.2d 178, 21 FEP Cas. 351 (4th Cir. 1979).

² 21 FEP Cas. 272 (D.C. Cir. 1979).

³ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976).

⁴ See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (cases cited in note 20).

⁵ Generally, the relevant labor market is composed of individuals who possess the specific qualifications required for the positions in question and who live within a reasonable distance of the employer's place of business. See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. at 310-12; *Greenspan v. Automobile Club of Michigan*, 22 FEP Cas. 184, 191 (E.D. Mich. 1980).

⁶ It should be stated at the outset that plaintiffs seldom rely solely on statistical evidence to prove a Title VII claim. Proof of individual instances of discrimination, and/or a showing that the defendant uses subjective hiring criteria, frequently accompany statistical evidence of discrimination. E.g., *International Bhd. of Teamsters v. United States*, 431 U.S. at 338-39; *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 838, 14 FEP Cas. 1143, 1148-49 (D.C. Cir. 1977).

⁷ For example, in *Hazelwood* teachers had been hired on the basis of "such intangibles as 'personality, disposition, appearance, poise, voice, articulation, and ability to deal with people'" 433 U.S. at 302.

skills. The Supreme Court has addressed this issue in two recent Title VII class actions.⁸ The opinions indicate that statistical data is normally limited to a comparison of the composition of the qualified workers in the relevant labor market with the composition of defendant's work force in that job category.⁹

In the first case, *International Brotherhood of Teamsters v. United States*,¹⁰ the Court found general population/work force comparisons probative where the jobs in question did not require special skills or qualifications.¹¹ The central claim in *Teamsters* was that the plaintiffs had been illegally denied truck driving positions.¹² Because driving is a skill generally possessed or readily acquired by the general public, the *Teamsters* Court allowed the plaintiffs to use general population statistics to prove their case.¹³ Nevertheless, while the *Teamsters* Court permitted the use of general population data, it cautioned that general population figures might not always "accurately reflect the pool of qualified job applicants. . . ."¹⁴ A second Supreme Court decision appearing shortly thereafter, *Hazelwood School District v. United States*,¹⁵ expanded on the caveat contained in *Teamsters*. The jobs in question in *Hazelwood* were teaching positions which required skills not possessed by the general population. The *Hazelwood* Court stated that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population . . . may have little probative value."¹⁶ The Court determined that since the comparative statistics introduced in the district court had been properly limited to public school teachers, and thus had taken into account the special qualifications for the position, such statistics were probative of the defendant's intent.¹⁷

While it is now apparently settled that general population statistics are probative of discrimination only in litigation involving unskilled jobs,¹⁸ a more basic problem has yet to be resolved: under what circumstances can a job be

⁸ *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

⁹ *Teamsters*, 431 U.S. at 339-40 n.20 & 342 n.23; *Hazelwood*, 433 U.S. at 308 & n.13. It is apparent from a reading of *Teamsters* and *Hazelwood* together that the Court did not entirely rule out the use of general population statistics in special qualification cases. When the statistical disparities are gross, a plaintiff may not be required to fine tune the statistics. See *Teamsters*, 431 U.S. at 342 n.23.

¹⁰ 431 U.S. 324 (1977).

¹¹ See *id.* at 339-40 n.20.

¹² *Id.* at 329.

¹³ *Id.* at 339-40 n.20. The *Hazelwood* Court's view of the statistics used in *Teamsters* is illuminating:

In *Teamsters*, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general areawide population was highly probative, because the skill there involved — the ability to drive a truck — is one that many persons possess or can fairly readily acquire.

Hazelwood, 433 U.S. at 308 n.13.

¹⁴ *Teamsters*, 431 U.S. at 340 n.20.

¹⁵ 433 U.S. 299 (1977).

¹⁶ *Id.* at 308 n.13. As stated in note 9 *supra*, the *Hazelwood* Court did not entirely rule out the use of general population comparisons in special qualification cases.

¹⁷ *Id.*

¹⁸ In addition to the Supreme Court's rationale developed in *Teamsters* and *Hazelwood*, see, e.g., the Fourth Circuit cases on the issue. *Hill v. Western Elcc. Co.*, 596 F.2d 99, 103-06, 19 FEP Cas. 490, 493-96 (4th Cir. 1979); *EEOC v. Chesapeake & Ohio Ry.*, 577 F.2d 229, 233, 17

said to require special qualifications. Since the evidentiary value of general statistical comparisons turns on whether the jobs in question are skilled or unskilled, such a determination assumes critical importance. This chapter will contrast the approach of the Court of Appeals for the Fourth Circuit with that of the Court of Appeals for the District of Columbia Circuit with respect to the question of special job qualifications in Title VII cases involving general statistical comparisons.

1. The Fourth Circuit Approach

In *EEOC v. Radiator Specialty Co.*,¹⁹ a *Survey* year Title VII class action, the Fourth Circuit defined the burdens of proof on the issue of whether particular jobs require special qualifications.²⁰ In the court's view, when it is not apparent simply from the identification of jobs in question whether special qualifications exist, the burden is on the employer to show that the positions in fact require special qualifications.²¹ If the employer fails to sustain his burden of proof, the general statistics will be presumed appropriate in assessing the plaintiff's prima facie proof.²² The *Radiator Specialty* court held that the issue of special qualifications must be addressed as a threshold issue by trial courts when the plaintiff seeks to use general population statistics to establish a prima facie case.²³

The *Radiator Specialty* case arose when an ex-employee of the Radiator Specialty Company (RSC) filed a charge of discrimination with the Equal Employment Opportunity Commission (the Commission or EEOC) against his former employer.²⁴ The Commission brought suit alleging that RSC had discriminated against blacks by restricting them to less desirable and lower paying jobs.²⁵ The Commission relied on statistical evidence which showed that while RSC's workforce included a higher percentage of blacks than did the general population in the relevant labor market, blacks were under-represented in RSC's professional, managerial, clerical, and sales positions.²⁶ Other evidence demonstrated that among the "new hires" into RSC's white collar positions, the percentages of blacks were substantially less than their representation in the general population, and that few of RSC's black employees were promoted into the jobs in question.²⁷ As a further indication of probable discrimination, the

FEP Cas. 815, 818 (4th Cir. 1978); *Roman v. ESB, Inc.*, 550 F.2d 1343, 1354-55, 14 FEP Cas. 235, 245 (4th Cir. 1976) (en banc).

¹⁹ 610 F.2d 178, 21 FEP Cas. 351 (4th Cir. 1979).

²⁰ *Id.* at 184-85, 21 FEP Cas. at 356.

²¹ *Id.* at 185, 21 FEP Cas. at 356.

²² *Id.*

²³ *Id.* at 185, 21 FEP Cas. at 357.

²⁴ *Id.* at 181, 21 FEP Cas. at 353.

²⁵ *Id.* The action alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976).

²⁶ The court gave the following example:

[I]n April 1971 RSC employed 207 white persons and 273 black persons. About 82% of the employed whites were either "white collar" employees or were supervisors or foremen in "blue collar" units. Less than 5% of the blacks employed were white collar, or were supervisors or foremen in blue collar units.

Id. at 181 n.2, 21 FEP Cas. at 353 n.2.

²⁷ *Id.* at 181, 21 FEP Cas. at 353.

EEOC presented evidence that RSC had utilized highly subjective standards for hiring and promotions.²⁸ The trial court considered the plaintiff's statistical data and the evidence of subjective hiring and promotion methods sufficient to establish a prima facie case of discrimination, which the defendant then failed to rebut.²⁹ After a trial on the merits, the trial court held that RSC had engaged in unlawful employment practices and ordered extensive injunctive relief.³⁰

On appeal, the circuit court considered the case below in light of *Hazelwood*, which the Supreme Court had decided in the interim. Using *Hazelwood* as authority, RSC contended that the EEOC's statistical evidence, which was based on general population comparisons, was insufficient as a matter of law to establish a prima facie case of discrimination with regard to hiring and promotion into professional, managerial, clerical, and sales positions because those positions required special qualifications.³¹ The court agreed with the defendant that RSC's professional positions³² manifestly required special qualifications neither commonly possessed nor readily acquired by the general population, and therefore that the plaintiff's proof was not sufficient to make out a prima facie case with respect to those positions.³³ Accordingly, the circuit court reversed the district court's finding of discrimination to that extent.³⁴

The court was unwilling, however, to accept the defendant's assertion that the remaining clerical, managerial, and sales positions also required special skills.³⁵ It was unclear to the court whether these jobs required special qualifications because the issue had not been addressed below; therefore, that issue was remanded to the district court.³⁶ The *Radiator Specialty* court suggested that on remand the district court might find it necessary to receive further evidence before it could resolve the question.³⁷ The Fourth Circuit court also indicated that if the defendant was able to establish that these positions required special skills, it would be necessary for the Commission to show a disparity between the percentage of qualified blacks in the population and the percentage of blacks holding those positions at RSC in order to make out a prima facie case.³⁸

In the course of its discussion, the court formulated guidelines allocating the burden of proof on the issue of special qualifications. The court observed that cases in which the plaintiff seeks to introduce general population statistical comparisons can be divided into three classifications.³⁹ The first category con-

²⁸ The district court found "that RSC utilized unpublicized, unwritten, and highly subjective standards and procedures for recruiting, hiring, transferring and promoting persons into its upper level positions." *Id.* at 181, 21 FEP Cas. at 354.

²⁹ EEOC v. Radiator Specialty Co., 20 FEP Cas. 704, 711-12 (W.D.N.C. 1979).

³⁰ *Id.* at 711-15.

³¹ 610 F.2d at 184, 21 FEP Cas. at 355.

³² The "professional positions" were not defined. Apparently, as part of its proof, the plaintiff had "identified and described" certain positions as professional, and the circuit court simply adopted the plaintiff's characterization. *Id.* at 185, 21 FEP Cas. at 357.

³³ *Id.* at 185-86, 21 FEP Cas. at 357.

³⁴ *Id.* at 186, 21 FEP Cas. at 357.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *id.* at 185, 21 FEP Cas. at 356.

tains cases in which it is manifest from the mere identification of the jobs in question that no special skills are required.⁴⁰ In such cases, a court may rule as a matter of law that the plaintiff's general population comparisons are probative.⁴¹ At the other end of the spectrum are cases in the second category. These cases involve positions that obviously require special qualifications. Thus, a court usually may not find a prima facie case on the basis of general statistical evidence.⁴² Between the two extremes lies the third category, in which it is not apparent whether the positions are skilled or unskilled.⁴³ The court ruled that in category three cases, unless the defendant establishes that the positions in fact require special qualifications, the plaintiff's statistics will be presumed appropriate in assessing the plaintiff's proof.⁴⁴ The *Radiator Specialty* court concluded that RSC's professional positions fell into category two, with the remaining jobs in the third category.⁴⁵

2. The District of Columbia Approach

In *Davis v. Califano*,⁴⁶ an individual Title VII action decided during the *Survey* year, the court reached a two-pronged holding. First, the court stated that any distinction between statistical proof in class and individual discrimination suits is largely artificial.⁴⁷ Thus, the court held that a private plaintiff alleging a violation of Title VII may prove a prima facie case of unlawful discrimination on the basis of statistical evidence alone.⁴⁸ Second, the court formulated a "minimum objective qualifications" test which it used in testing the sufficiency of the plaintiff's prima facie statistical evidence.⁴⁹ In the *Davis* court's view, the qualified labor market used in a Title VII plaintiff's statistical comparisons is composed of those persons who possess the minimum objective qualifications of the job in question.⁵⁰ If, as in the *Davis* case, promotion decisions into the position in question are based entirely on subjective criteria with no objective requirements, then the court would allow a plaintiff to establish a prima facie case using general statistics comprising all of the employees of the organization at which the plaintiff is employed.⁵¹

⁴⁰ *Id.*

⁴¹ *Id. Tramsters*, which involved truck driving positions was cited by the *Radiator Specialty* court as an example of a category one case. *Id.*

⁴² *Id. Hazelwood*, which concerned teaching positions, was cited by the *Radiator Specialty* court as an example of a case falling into the second category. *Id.*

⁴³ *Id.*

⁴⁴ *Id.* The court did not specifically cite an example of a category three case. Certain technical positions, however, e.g., computer programmer or laboratory technician, would seem to fall within this category.

⁴⁵ *Id.* at 185-86, 21 FEP Cas. at 357.

⁴⁶ 21 FEP Cas. 272 (D.C. Cir. 1979).

⁴⁷ *Id.* at 276-77.

⁴⁸ *Id.* at 276.

⁴⁹ *Id.* at 278.

⁵⁰ *Id.*

⁵¹ In promotion cases such as *Davis*, the organization in which the plaintiff is an employee is viewed as the relevant labor market. *Id.* Thus, even though the plaintiff's statistics did not compare the composition of defendant's work force for the job in question with that of the general population, the comparisons actually made by the plaintiff were, in a sense, general

The plaintiff in *Davis* was a white woman employed by the federal government as a Ph.D. research chemist at the National Heart, Lung and Blood Institute (NHLBI).⁵² She had been on the job for several years, and had received several promotions⁵³ before she was denied a promotion to a scientific staff position, a job which required considerable expertise.⁵⁴ The plaintiff sued her employer, alleging that she was denied the promotion on the basis of her sex.⁵⁵ She relied almost exclusively on statistical evidence of disparate treatment of males and females by her employer to prove that its employment decisions were illegally discriminatory.⁵⁶ Other evidence indicated that promotions were made on an *ad hoc* basis using subjective criteria by predominantly male promotion panels.⁵⁷ Although the job sought by the plaintiff, that of independent investigator, did not carry established minimum objective qualifications,⁵⁸ such positions generally were filled by persons with either M.D. or Ph.D. degrees who had participated in a staff fellowship program designed by the NHLBI to give candidates an opportunity to demonstrate their capacity for the job.⁵⁹

After a trial on the merits, the district court entered judgment for the defendant.⁶⁰ The court concluded, *inter alia*, that as a matter of law the plaintiffs' statistics were not relevant because they did not contain information regarding that pool of applicants specifically qualified for the independent investigator position.⁶¹ For support, the district court relied on precedent holding that when a job requires special qualifications, the plaintiff must introduce data concerning the number of qualified persons in that particular labor pool in order to establish a *prima facie* case, and cannot rely on more general statistics.⁶² Alternatively, the district court concluded that, even if the plaintiff's statistics were relevant, statistics alone may not prove a *prima facie* case in an individual, as opposed to a class, action.⁶³

On appeal, the circuit court reversed the district court's decision.⁶⁴ The

statistical comparisons. All of the employees at the National Heart, Lung and Blood Institute, regardless of their position, were considered part of the *qualified* labor market. *Id.*

⁵² *Id.* at 274.

⁵³ *Id.* The plaintiff had received promotions from her starting position, at GS-5, to a GS-9 level position.

⁵⁴ *Id.* at 274-75.

⁵⁵ *Id.* at 274. The plaintiff alleged that the defendant had unlawfully discriminated against her in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1976).

⁵⁶ See 21 FEP Cas. at 275.

⁵⁷ *Id.* at 274. "No objective criteria were established to guide the promotion decisions of supervisors, branch chiefs and *ad hoc* promotion panels. . . ." *Id.* at 279.

⁵⁸ While the independent investigator position did not require minimum objective qualifications, the court did state that the "qualifications for a senior scientific research staff position of independent investigator, . . . are the capability of perceiving a specific research problem and developing a hypothesis and protocol for determining its truth or falsity." *Id.* at 275.

⁵⁹ *Id.*

⁶⁰ *Davis v. Califano*, 19 FEP Cas. 1045, 1052 (D.D.C. 1978).

⁶¹ *Id.* at 1052.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Davis v. Califano*, 21 FEP Cas. 272, 276 (D.C. Cir. 1979).

court first addressed the trial court's alternative conclusion that a prima facie case may be established by the use of statistical evidence in an individual case. In doing so, the court drew a parallel between recovery by individuals in class actions, and recovery in individual discrimination suits.⁶⁵ The court observed that once the prima facie case is established in a class action, individual claimants may recover for particularized injuries by showing merely that they belong to the class, and that a promotion or other job benefit was denied them during the period of class discrimination.⁶⁶ Because the court saw no fundamental difference between class and individual actions, it held that relief in an individual case should be forthcoming on exactly the same standards.⁶⁷

The *Davis* court next addressed the district court's primary conclusion that the plaintiff's statistics were in any event irrelevant. The court of appeals reversed the trial court on this point, finding that the statistics introduced by the plaintiff were not only relevant, but were probative of a discriminatory intent on the part of her employer.⁶⁸ In the court's view, because there were no minimum objective qualifications for the position sought by the plaintiff, use of relatively general statistical comparisons was proper.⁶⁹ The total absence of objective criteria used by the employer in its promotion decisions provided additional support for the plaintiff's prima facie case.⁷⁰ Thus, the plaintiff was allowed to establish a prima facie case with statistics comparing the composition of the NHLBI's upper grade and salary staff with the composition of the entire work force at NHLBI, including secretaries and file clerks.⁷¹

Davis was decided over a strong dissent. While the dissenting judge implicitly conceded that statistics sometimes may be used by an individual plaintiff to make out a prima facie case of discrimination, he would have affirmed the lower court decision on the basis of one of four suggested alternative holdings, only one of which is relevant here.⁷² The dissent would have held, *inter*

⁶⁵ The Court reasoned that if, statistical proof of a 'broad-based policy of employment discrimination [provides] reasonable grounds to infer that individual [employment] decisions were made in pursuant of the discriminatory policy . . . and require[s] the employer to come forth with evidence dispelling that inference' in a class action, so too should the use of statistical evidence have equal force and effect in an individual discrimination case.

Id. at 277 (quoting *Teamsters*, 431 U.S. at 359).

⁶⁶ *Id.* at 277.

⁶⁷ *Id.* at 276-77. *Davis* is significant in this respect. Although the Court of Appeals for the District of Columbia had previously hinted that statistical evidence might establish a prima facie case in an individual action, see *Hackley v. Roudebush*, 520 F.2d 108, 158, 11 FEP Cas. 487, 526 (D.C. Cir. 1975); *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 839, 14 FEP Cas. 1143, 1149 (D.C. Cir. 1977), *Davis* is the first decision by any federal court directly holding that a private plaintiff may prove a prima facie case on the basis of statistical evidence alone. This part of the *Davis* opinion is treated cursorily because of the chapter's focus on the *Davis* court's minimum objective qualifications standard.

⁶⁸ 21 FEP Cas. at 277-79.

⁶⁹ *Id.*

⁷⁰ *Id.* at 274. Subjective procedures often "encourage and foster discrimination" and the court reasoned that they must therefore be more closely scrutinized. *Id.* at 279.

⁷¹ See *id.* at 278.

⁷² *Davis*, 21 FEP Cas. at 279 (dissenting opinion). The dissent also reasoned that even if the plaintiff had established a prima facie case, the defendant had successfully rebutted the plain-

alia, that the plaintiff's statistics were not sufficiently detailed to make out a prima facie case in an individual action involving a highly skilled position.⁷³ Because of the great skill necessary for the job, the dissenter would have required the plaintiff's initial proof to touch on the obvious qualifications considered for the job.⁷⁴

3. A Comparison of the Approaches

The *Radiator Specialty* case represents the latest in a series of Fourth Circuit decisions which have attempted to limit the use of general statistical comparisons in discrimination cases.⁷⁵ These cases have responded specifically to plaintiffs who sought to introduce general statistics when the jobs involved were skilled. In *Radiator Specialty*, the Fourth Circuit's consideration of the issue culminated in the guidelines discussed above which enable a trial court, by placing the job in question into one of three categories, to determine more easily when a Title VII plaintiff's general statistical proof may be sufficient to make out a prima facie case.

The Fourth Circuit's guidelines prevent a plaintiff from using statistics which have little probative value to shift the burden to the defendant to rebut an inference of discrimination. *Radiator Specialty* protects a defendant in two ways. First, if a court is convinced that the case involves an obviously skilled position a plaintiff's general population statistics normally will not be considered.⁷⁶ Second, a defendant will be able to prevent a prima facie showing on the basis of general population statistics where the jobs are not clearly skilled or unskilled if he can show that the jobs are in fact skilled.⁷⁷ A defendant is thus given procedural protection from plaintiffs who build shaky claims with broad statistical comparisons in cases involving skilled jobs.

The court's guidelines also recognize, to a lesser extent, the difficulties a plaintiff may have in obtaining the proper evidence to establish a prima facie case. Accordingly, in cases involving all but obviously skilled positions, a plaintiff may establish a prima facie case with more easily accessible general population statistics,⁷⁸ unless the defendant sustains his burden of proving special qualifications.

Radiator Specialty proceeded from the premise that general statistics are probative unless the job in question requires special qualifications. It then reached a limited holding focusing upon the burden of proving special qualifications in a discrimination case. Although the *Davis* case started from the same basic tenet, it bypassed the analysis that was the focus of *Radiator Specialty*, and arrived at a much broader holding. The *Davis* court discussed the specific

tiff's initial showing, that the plaintiff's statistics were equivocal and insufficient to establish a prima facie case, and lastly that because the plaintiff elected not to participate in the internal staff fellowship program she failed to show that she was qualified for the position she sought. *Id.*

⁷³ *Id.* at 280-81. See text at note 84 *infra*.

⁷⁴ *Id.* at 281.

⁷⁵ See cases cited in note 18 *supra*.

⁷⁶ *Radiator Specialty*, 610 F.2d at 185, 21 FEP Cas. at 356.

⁷⁷ *Id.*

⁷⁸ General population data is readily available to the public in the form of census data, Standard Metropolitan Statistical Area data and the like.

nature of statistical comparisons necessary to establish a prima facie case, no matter what type of position is the subject of litigation. The court held that only the minimum objective qualifications necessary for one to be eligible for the particular job must be considered in the statistical data presented initially by the plaintiff.⁷⁹

The effect of the *Davis* holding is that general statistical comparisons are probative in all cases unless the defendant has established minimum objective qualifications for the job in question.⁸⁰ This is so whether the job involved is a highly skilled scientific research position, as in *Davis*, or an unskilled truck driving position, like those in *Teamsters*. The fact that a job requires "special skills," by itself, has no effect on a plaintiff's prima facie case. Job requirements must be in the form of minimum objective qualifications required of all hirees. Only then does a Title VII plaintiff have to adjust the qualified labor pool for his comparisons to reflect the minimum job requirements.

The court's focus in *Davis* is, more than anything else, a recognition of the practical realities of establishing a prima facie case with statistics. No plaintiff would be able to account for every conceivable factor relevant to the promotion or hiring decision in his statistics. To force him to do so would present a formidable barrier to the establishment of a prima facie case. Thus, while an employer actually might consider any number of qualifications desirable in filling certain positions, a plaintiff should only be required to adjust its statistical comparisons to reflect those qualifications that are required of all candidates.⁸¹ The defendant is in a much better position to introduce more refined statistics reflecting additional relevant criteria as part of its rebuttal.

Despite its apparent beneficial effects, the standard set out in the *Davis* decision has at least one major drawback. The minimum objective qualifications test accounts for only the objective job criteria which are applied to all hirees. Thus a plaintiff's prima facie proof may disregard any objective qualifications not possessed by *all* candidates, as well as all subjective criteria used in hiring. Clearly, the standard is of considerable aid to the plaintiff in establishing its prima facie case.⁸² In some cases, however, the plaintiff's proof will meet the minimum objective qualifications standard, but will in fact be highly

⁷⁹ *Davis*, 21 FEP Cas. at 278.

⁸⁰ The *Davis* court does not explicitly indicate whether the plaintiff or the defendant must show that a job has minimum objective qualifications. Nonetheless, it would appear *de facto* that a defendant would have to shoulder the burden of doing so at the peril of allowing the plaintiff to establish a prima facie case with statistics that do not account for any special qualifications. Cf. *Radiator Specialty*, 610 F.2d at 185, 21 FEP Cas. at 356 (category three cases).

⁸¹ *Davis*, 21 FEP Cas. at 278. The *Davis* court noted that the Supreme Court limited the relevant labor market in *Hazelwood* to teachers, but did not require that the statistics reflect years of work experience, quality of training, and other potentially relevant factors. *Id.* at 278 n.42.

A further illustration of the *Davis* court's rationale lies in the court's observation:

[I]f a particular number of years of work experience were established as a minimum job criterion, then that would need to be reflected in the proffered statistics.

If, however, work experience were only a factor to be considered in promotion decisions, a plaintiff's statistical data need not take that into account.

Id. at 278.

⁸² At the risk of stating the obvious, the *Davis* court appeared to have been concerned primarily with aiding a Title VII plaintiff in his efforts to establish a prima facie case. In contrast, *Radiator Specialty* focused on protecting discrimination defendants from prima facie shiftings on the basis of overbroad statistical comparisons.

suspect as a true indication of the defendant's intent. This is especially likely in cases involving upper level positions where hiring criteria are not clearly stated and may be largely subjective.⁸³ As stated in the dissent to *Davis*, the minimum objective qualifications test may ignore the obvious skill requirements of the job if they are not required uniformly of all candidates.⁸⁴

The *Davis* case presents an example of an extreme fact situation which does not fit into the court's minimum objective qualifications analysis. Although the job in question did not carry any minimum objective qualifications, it obviously required highly technical skill and experience. Virtually all of the positions were filled by persons with doctoral degrees who had completed a fellowship program at the NHLBI. Thus, those two criteria were tantamount to minimum qualifications. At the least, the plaintiff should have had to introduce comparisons which restricted the labor pool to those employees possessing those characteristics. It seems ludicrous, as was done in *Davis*, to allow the plaintiff to establish a prima facie case with statistics using the entire staff at the NHLBI as the qualified labor pool for the independent investigator positions.⁸⁵ The employer in *Davis* was unjustly given the burden of rebutting an inference of discrimination based on very weak evidence.

Notwithstanding the questionable result reached on the facts of *Davis*, a minimum objective qualifications standard is a workable approach. The standard yields an unreasonable result only in extreme cases, such as *Davis*, where no objective job qualifications have been established and the jobs in question are obviously skilled. In most other cases, it can be argued that if minimum objective qualifications do not exist then none are necessary. Therefore, the plaintiff's general statistics may be used quite properly in order to establish a prima facie case.

It is doubtful that the Fourth Circuit would disagree with the District of Columbia Circuit's minimum objective qualifications test as a standard for determining the qualified labor pool for statistical comparisons. In fact, the *Radiator Specialty* court, true to the rationale of *Davis*, would allow a plaintiff to establish a prima facie case with general population statistics unless the defendant showed that the job required special skills.⁸⁶ The Fourth Circuit, however, undoubtedly would take issue with the *Davis* court's exclusive focus on a job's minimum objective qualifications without considering the job itself. Unlike the *Davis* majority, the *Radiator Specialty* court would not limit its inquiry to a position's minimum objective qualifications in determining whether general population comparisons are probative. In some cases, according to *Radiator*

⁸³ That is not to say that if a plaintiff introduced refined statistical data reflecting the minimum objective qualifications of a highly skilled job (where such qualifications existed) to establish a prima facie case, the *Davis* court's standard would not be useful. Nonetheless, where an obviously skilled position carries no minimum objective qualifications it is unfair to allow a plaintiff to establish a prima facie case with general statistics which are not probative.

This conclusion may leave a plaintiff faced with such a case unable to establish a prima facie case with statistics. He cannot use general population data because the job is obviously skilled, and he cannot use more refined statistics because the job has no minimum objective qualifications that can be reflected statistically. In this type of case, hopefully other forms of proof of the defendant's intent can be employed.

⁸⁴ *Davis*, 21 FEP Cas. at 281 (dissenting opinion).

⁸⁵ *Davis*, 21 FEP Cas. at 278.

⁸⁶ *Radiator Specialty*, 610 F.2d at 185, 21 FEP Cas. at 356.

Specialty, it is obvious from the mere identification of the job that it requires special qualifications, and therefore the plaintiff's general statistics will not be considered.⁸⁷ The *Radiator Specialty* guidelines suggest that, as a matter of practical judgment, a court could decide that a plaintiff's general statistics are not probative in such cases. No inquiry into the job's minimum objective qualifications would be necessary.⁸⁸ As stated by the *Davis* court itself:

The invocation of statistical data works no magical incantation. As with any evidence, the usefulness of the statistical evidence "depends on all of the surrounding facts and circumstances."⁸⁹

In *Davis*, the surrounding evidence suggested that the plaintiff's general statistics were of little probative value. The court should have considered such evidence instead of focusing exclusively on the job's minimum objective qualifications.

With *Davis* and *Radiator Specialty*, the District of Columbia Circuit and the Fourth Circuit have made useful contributions to efforts being made to define the proper statistical comparisons in discrimination cases involving jobs with special qualifications. Courts may adopt either approach with probable substantial benefit. The guidelines set forth in *Radiator Specialty* will aid courts in assessing the sufficiency of a plaintiff's general population comparisons. Similarly, the minimum objective qualifications standard promulgated in *Davis*, while leading to a poor result on the facts of the case, should be adopted as the statistical standard plaintiffs must normally meet in order to establish a prima facie case. Only in the rare case involving obviously skilled positions with no established minimum objective qualifications, should the *Davis* court standard yield to the more practical approach set forth by the Fourth Circuit in *Radiator Specialty*.

IV. TITLE VII AND THE EQUAL PAY ACT:

*Gunther v. County of Washington**

In an attempt to eliminate the existence of widespread wage discrimination against women,¹ Congress enacted the Equal Pay Act of 1963.² The Act specifically prohibits employers from discriminating between employees on the

⁸⁷ *Id.* at 185, 21 FEP Cas. at 356. See text at note 42 *supra*.

⁸⁸ By the same token, if the case fell into *Radiator Specialty's* category three (neither obviously skilled or unskilled), *Davis's* minimum objective qualifications standard would be used. Presumably, the plaintiff's statistics would have to be adjusted to reflect only the special qualifications that the defendant was successful in showing. *Radiator Specialty*, 610 F.2d at 185, 21 FEP Cas. at 356. There the court stated: "If the defendant succeeds [in sustaining the burden of showing that the jobs are skilled] the plaintiff should have an opportunity to adjust his statistical proof to reflect a labor pool base with the special qualifications found required." *Id.*

⁸⁹ *Davis*, 21 FEP Cas. at 276 (quoting *Teamsters*, 431 U.S. at 340).

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¹ See Declaration of Purpose of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 59-60. See also HOUSE COMM. ON EDUCATION AND LABOR, REPORT ON THE EQUAL PAY ACT OF 1963, H.R. REP. NO. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687-92.

² The Equal Pay Act of 1963 amended § 6 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (1976), by adding subsection (d), 29 U.S.C. § 206(d) (1976). The Equal Pay Act

basis of sex by paying unequal wages for equal work.³ The Act excepts from this equal work-equal pay standard, however, any compensation made pursuant to a seniority system, a merit system, a quality or quantity production system, or a differential based upon a factor other than sex.⁴ One year after enacting the Equal Pay Act, Congress passed Title VII of the Civil Rights Act of 1964.⁵ Although more comprehensive than the Equal Pay Act, section 703(a)(1) of Title VII also prohibits wage discrimination on the basis of sex.⁶ Apparently concerned that section 703(a)(1) might conflict with the Equal Pay Act, Senator Bennett⁷ introduced an amendment to Title VII which ensured the coordination of the two statutes.⁸ Specifically, the Bennett Amendment provides that it is not an unlawful employment practice under Title VII "for any employer to differentiate upon the basis of sex in determining the amount

provides in pertinent part:

No employer having employees subject to any provisions of this section shall discriminate, . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based upon any other factor other than sex. . . .

29 U.S.C. § 206(d) (1976).

³ See text of the Equal Pay Act at note 2 *supra*. Although the phrase "equal work" has been interpreted as requiring that the work performed be more than comparable, *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1173-74, 14 FEP Cas. 1178, 1786-87 (3d Cir. 1977), the jobs need not be identical. *Usery v. Columbia Univ.*, 568 F.2d 953, 958, 15 FEP Cas. 1333, 1336 (2d Cir. 1977); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265, 9 FEP Cas. 502, 506 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). Instead, the courts have adopted a substantially equal standard, under which jobs are considered "equal" if the actual work performed involves skill, effort, and responsibility of a substantially equal nature. *Ridgway v. United Hospitals-Miller Div.*, 563 F.2d 923, 926, 16 FEP Cas. 345, 347 (8th Cir. 1977); *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 285, 9 FEP Cas. 979, 980 (4th Cir. 1974).

⁴ See text of the Equal Pay Act at note 2 *supra*. Because of their precise language, the first three specific exceptions pertaining to seniority, merit and productivity systems have raised few interpretive problems. See 1 LARSON, EMPLOYMENT DISCRIMINATION, § 31.10 (1979). The fourth, more sweeping exception, which allows pay differentials that are based upon factors other than sex, has been more troublesome. Generally, the exception has been construed as covering situations involving temporary work assignments, 29 C.F.R. § 800.147 (1979), employee training programs, *id.*, and night shift work, *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). Problems have arisen, however, in determining whether such factors as experience, hours of work, and physical exertion make the work performed unequal and thus outside the scope of the Equal Pay Act; or whether these variants qualify under the broad other than sex exception. See 1 LARSON, EMPLOYMENT DISCRIMINATION, §§ 31.10-.27 (1979).

⁵ 42 U.S.C. §§ 2000e-1 to 17 (1976).

⁶ Apart from prohibiting discrimination based on an individual's race, color, religion or national origin, section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) (1976), provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's sex. . . ." *Id.*

⁷ Wallace Foster Bennett, Republican Senator from Utah.

⁸ 110 CONG. REC. 13647 (1964) (remarks of Senator Bennett). Unlike the Equal Pay Act, which was a product of careful legislative consideration, see note 1 *supra*, the sex discrimination provisions of Title VII were included hastily in the Civil Rights Act only one day prior to the bill's enactment. Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil*

of . . . compensation paid . . . if such differentiation is authorized by the [Equal Pay Act]."⁹

Although all courts agree that the Equal Pay Act and Title VII should be construed harmoniously,¹⁰ two conflicting interpretations of the Bennett Amendment itself have been adopted. Some courts, for instance, view the amendments as incorporating within Title VII the Equal Pay Act's equal work standard as well as the statute's four exceptions which authorize pay differentials that are based upon factors other than sex.¹¹ Under this view, only claims based upon allegations of unequal pay for equal work are cognizable under Title VII.¹² A second group of courts, however, interpret the Bennett Amendment as incorporating only the four exceptions of the Equal Pay Act within Title VII.¹³ Under this construction, claims of discriminatory compensation not based upon allegations of equal work may be brought under Title VII even though they would not constitute a cause of action under the Equal Pay Act.¹⁴

During this *Survey* year, the issue of the relationship between Title VII and the Equal Pay Act with respect to discriminatory compensation arose for the

Rights Act and the Equal Pay Act of 1963, 20 HASTINGS L.J. 395, 310-13 (1968). Since the sex provisions were offered by a principal opponent of the Civil Rights Act, many commentators have suggested that the amendment protecting women's rights actually was introduced to prevent passage of the underlying legislation. *Id.* Because of these unusual circumstances, Senator Bennett suggested amending Title VII to guarantee that the "provisions of the Equal Pay Act shall not be nullified." 110 CONG. REC. 13647 (1964) (remarks of Senator Bennett). See note 48 *infra* for the complete text of the Bennett Amendment's legislative history.

⁹ 42 U.S.C. § 2000e-2(h) (1976). The Bennett Amendment provides that:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

Id.

¹⁰ Both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 serve the same basic purpose of remedying discrimination in the areas of compensation. Because of this common goal, courts agree that the two statutes must be construed harmoniously. See *DiSalvo v. Chamber of Commerce*, 568 F.2d 593, 20 FEP Cas. 825 (8th Cir. 1978); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 10 FEP Cas. 697 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117, 3 FEP Cas. 910 (10th Cir. 1971).

¹¹ *IUE v. Westinghouse Elec. Corp.*, 19 FEP Cas. 450, 457 (D.N.J. 1979) (Title VII suit involving a discriminatory compensation claim); *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 400-01, 17 FEP Cas. 232, 235 (W.D. Pa. 1978) (Title VII suit involving unequal and discriminatory compensation claims); *Molthan v. Temple Univ.*, 442 F. Supp. 448, 454-55, 16 FEP Cas. 581, 585-86 (E.D. Pa. 1977) (action under first and fourteenth amendments to the United States Constitution, 42 U.S.C. § 1983, Title VII, and the Equal Pay Act).

¹² Courts adopting this view reason that any conduct not specifically prohibited by the Equal Pay Act is, by negative implication, *authorized* by the Act and, thus, by virtue of the Bennett Amendment, immune from attack under Title VII. See, e.g., *IUE v. Westinghouse Elec. Corp.*, 19 FEP Cas. 450, 453 (D.N.J. 1979).

¹³ *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 446, 13 FEP Cas. 1068, 1078 (D.C. Cir. 1976) (equal pay claim under Equal Pay Act and Title VII claims unrelated to compensation); see also *Manhart v. City of Los Angeles, Dep't. of Water and Power*, 553 F.2d 581, 590, 13 FEP Cas. 1625, 1631-32 (9th Cir. 1976), *aff'd in part and rev'd in part on other grounds*, 435 U.S. 702 (1978).

¹⁴ Under this construction, the Bennett Amendment is viewed as limiting the Equal Pay Act's interaction with Title VII to situations involving only equal work. In instances when unjustifiably large pay differentials occur for unequal work, the Equal Pay Act is deemed inapplicable. See 1 LARSON, EMPLOYMENT DISCRIMINATION. §§ 29.80, 33.10 (1979).

first time before an appellate court in *Gunther v. County of Washington*.¹⁵ The United States Court of Appeals for the Ninth Circuit interpreted the Bennett Amendment as incorporating within Title VII the four exceptions, but not the equal work requirement, of the Equal Pay Act.¹⁶ By adopting this interpretation, the circuit court in effect held that Title VII is broader in scope than the Equal Pay Act. Accordingly, while acknowledging that the Act's standard should control whenever a claim of unequal pay for equal work is litigated under Title VII,¹⁷ the court held the Equal Pay Act inapplicable whenever a Title VII suit involves a charge of discriminatory compensation for comparable jobs rather than an allegation of lower wages for the same work.¹⁸ Under the circuit court's ruling, plaintiffs instituting a Title VII suit are no longer limited to a theory of unequal pay for equal work. Rather, employees can challenge their employer's discriminatory compensation practices for comparable or even unique work.¹⁹

The plaintiffs in *Gunther* were four women formerly employed as matrons in the Washington County jail.²⁰ The matrons worked in the female section of the jail, while male deputy sheriffs staffed the male section.²¹ The female matrons and the male deputies shared similar principal responsibilities in that both groups processed, guarded, and transported their prisoners to and from court.²² Because of the difference in the number of male and female prisoners, however, the time which both groups spent performing their respective duties varied. For example, since there were typically three matrons for every prisoner, the female guards spent much of their time doing clerical work.²³ Conversely, since the male prisoners outnumbered the deputies by a ratio of four to one, the male guards devoted more time to the inmates and less time to clerical chores.²⁴

Prior to February 1973, the pay for the male deputies ranged from \$668 to \$853 per month, whereas the matrons received \$476 to \$606 per month.²⁵ In February of 1973, a ten-percent salary range increase became effective for both groups even though a thirty-percent raise had been recommended for the female guards.²⁶ In June of 1973, corrections officers, receiving a salary

¹⁵ 602 F.2d 882, 20 FEP Cas. 792 (9th Cir. 1979). Although some appellate courts have commented on the interrelationship between the Equal Pay Act and Title VII, these cases, unlike *Gunther*, have involved claims alleging a denial of equal pay for equal work. See, e.g., *DiSalvo v. Chamber of Commerce*, 568 F.2d 593, 20 FEP Cas. 825 (8th Cir. 1978); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 10 FEP Cas. 697 (5th Cir.), cert. denied, 423 U.S. 865 (1975).

¹⁶ 602 F.2d 882, 890, 20 FEP Cas. 792, 797 (9th Cir. 1979).

¹⁷ *Id.* at 891, 20 FEP Cas. at 798.

¹⁸ *Id.*

¹⁹ See note 66 *infra*.

²⁰ 602 F.2d 882, 885, 20 FEP Cas. 792, 793 (9th Cir. 1979).

²¹ *Id.*

²² 20 FEP Cas. 788, 789 (D. Or. 1976).

²³ Often having no other tasks to perform, the matrons did the clerical work relating to the male as well as the female prisoners. 602 F.2d 882, 888, 20 FEP Cas. 792, 796 (9th Cir. 1979).

²⁴ 20 FEP Cas. 788, 789 (D. Or. 1976).

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ranging from \$701 to \$812 per month, began replacing the deputy sheriffs in the male section of the jail.²⁷ Although the newly created corrections officers' positions were open to females, plaintiffs did not apply for these jobs, but instead asked their union to demand equal pay for the women guarding the female prisoners.²⁸ Although reviewed by the union and the County Commissioners, plaintiffs' demand was never acted upon since the County subsequently decided to house the female inmates in an adjoining county's facility, a decision which eliminated the matrons' positions in Washington County.²⁹ As a result, plaintiffs filed a Title VII suit in federal district court claiming, *inter alia*, that the County³⁰ had denied them equal pay for equal work.³¹ Alternatively, the plaintiffs contended that even if their work was not substantially equal to that performed by the male guards, at least some of the pay differential was attributable to sex discrimination.³²

Rejecting both of plaintiffs' contentions, the district court found first that the work performed by the female matrons was not substantially equal to that done by the male guards.³³ Next, in dismissing plaintiffs' alternative claim of discriminatory compensation, the district court merely stated that since the jobs were, in fact, dissimilar "that is the end of our inquiry."³⁴ In effect, by refusing to consider the plaintiffs' claim of discriminatory compensation for comparable jobs, the district court confined the scope of Title VII to situations involving equal work.

On appeal, the Ninth Circuit affirmed the district court's initial finding that the work performed by the male and female guards was not substantially equal.³⁵ In so doing, the circuit court first emphasized the prisoner-guard ratio and noted that the male jailers guarded twelve times as many inmates as the female guards.³⁶ Turning to the amount of clerical work, the court next stressed that the matrons spent as much as fifty percent of their time doing clerical tasks, whereas the male guards devoted little time to these duties.³⁷ The

²⁷ *Id.* The position of corrections officer was created by the Washington County Commissioners to free the time of the deputy sheriffs and to "professionalize the job of jail guard." *Id.*

²⁸ *Id.*

²⁹ *Id.* at 790. Between 1971 and 1973 the number of male prisoners processed by Washington County jumped from 1884 to 3270. Because of this overcrowding, several male inmates were required to sleep on the floor, a factor causing the American Civil Liberties Union to file an action against the County. In order to alleviate this overcrowding, the Commissioners voted to house women prisoners in Clackamas County jail. As a result of this change the six matrons' positions in Washington County were eliminated and replaced by two and a half police stenographers. *Id.*

³⁰ In addition to the County, plaintiffs sued their supervisors: Sheriff Barnes, Captain Friese, and Sergeant Ramseth. 602 F.2d 882, 885 & n.2, 20 FEP Cas. 792, 793 & n.2 (9th Cir. 1979).

³¹ 20 FEP Cas. 788, 789 (D. Or. 1976). In addition to the equal pay charge, plaintiffs alleged that the County terminated and refused to rehire them because they sought pay equivalent to that of the new corrections officers. *Id.* The circuit court affirmed the district court's dismissal of these retaliation claims. 602 F.2d 882, 891-894, 20 FEP Cas. 792, 798-801 (9th Cir. 1979).

³² 20 FEP Cas. 788, 791 (D. Or. 1976).

³³ *Id.*

³⁴ *Id.*

³⁵ 602 F.2d 882, 886-88, 20 FEP Cas. 792, 794-96 (9th Cir. 1979).

³⁶ *Id.* at 887, 20 FEP Cas. at 795.

³⁷ *Id.* at 888, 20 FEP Cas. at 796.

circuit court reasoned that taken together the greater amounts of clerical work and the smaller number of prisoners made the matrons' jobs "qualitatively" different from the work performed by the male jailers.³⁸ Since the jobs were not substantially equal, the circuit court approved the district court's dismissal of the equal work-equal pay component of the plaintiffs' Title VII suit.³⁹

Reversing the lower court in part, however, the Ninth Circuit ruled that the mere finding of unequal work did not dispose of the entire case because the plaintiffs' alternative argument involved, not the equality of the work performed, but the comparative scope of Title VII and the Equal Pay Act.⁴⁰ In the *Gunther* court's view, the plaintiffs, in effect, had argued that Title VII was broader than the Equal Pay Act, and thus it allowed them to establish that sex discrimination had produced at least part of the discrepancy in pay irrespective of the equality of the work performed.⁴¹ In determining the validity of plaintiffs' argument, the circuit court specifically addressed the relationship between Title VII and the Equal Pay Act.⁴² Initially, the court observed that the Equal Pay Act pertains to neither unique nor comparable positions, but instead is limited to jobs entailing the performance of substantially equal work.⁴³ Noting in contrast that the language of section 703(a)(1) does not similarly confine the scope of Title VII, the circuit court next focused on the Bennett Amendment's proviso that any wage differentiation "authorized by the provisions of the [Equal Pay Act]" is not an unlawful employment practice under Title VII.⁴⁴ In construing this language, the *Gunther* court acknowledged the plausibility of two interpretations. Under one interpretation, the amendment could be viewed as incorporating an equal work requirement into Title VII, which would make the scope of section 703(a)(1) coextensive with that of the Equal Pay Act.⁴⁵ Rejecting this interpretation, however, the *Gunther* court construed the Bennett Amendment as incorporating only the four affirmative defenses of the Equal Pay Act into Title VII.⁴⁶ Hence, the court concluded that the amendment does not limit the scope of section 703(a)(1), but merely insulates from attack under Title VII the compensation practices authorized by the four listed exceptions of the Equal Pay Act.⁴⁷

In reaching this conclusion, the circuit court relied on both the legislative history of the Bennett Amendment and the broad remedial purpose underlying Title VII. At the outset, the court observed that according to the legislative history, Congress never intended the Bennett Amendment to apply to situations involving discriminatory compensation.⁴⁸ Instead, the amendment's pur-

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 889, 20 FEP Cas. at 796. See note 3 *supra*.

⁴⁴ 602 F.2d 882, 889, 20 FEP Cas. 792, 796 (9th Cir. 1979). See note 9 *supra* for the complete text of the Bennett Amendment.

⁴⁵ 602 F.2d 882, 889, 20 FEP Cas. 792, 797 (9th Cir. 1979).

⁴⁶ *Id.* at 890-91, 20 FEP Cas. at 797-98.

⁴⁷ *Id.*

⁴⁸ *Id.* at 891, 20 FEP Cas. at 797. The relevant legislative history of the Bennett Amendment is as follows:

Mr. BENNETT. Mr. President, after many years of raving by members of the

pose was to ensure that the Equal Pay Act would not be nullified in the event of conflict with Title VII.⁴⁹ This was accomplished by preserving in Title VII the four affirmative defenses provided under the Equal Pay Act which authorize pay differentials that are based on factors other than sex.⁵⁰ In support of its conclusion that the Bennett Amendment encompassed the exceptions but not the work requirement mandated by the Equal Pay Act, the *Gunther* court stressed Senator Dirksen's⁵¹ statement that "[a]ll that the pending amendment does is recognize those exceptions."⁵² In the absence of explicit legislative intent, the Ninth Circuit concluded that Title VII's broad remedial purpose of eliminating employment discrimination should not be confined to situations involving equal work, particularly since such a limitation would allow "other equally harmful discriminatory practices" to escape review.⁵³

Having set forth its own interpretation of the Bennett Amendment, the Ninth Circuit next distinguished those district court decisions that had adopted a contrary construction.⁵⁴ The *Gunther* court observed that while these lower courts viewed the Bennett Amendment as incorporating both Equal Pay Act standards and exceptions into Title VII, their position was not inconsistent with its own interpretation.⁵⁵ Because the cases considered by the lower courts involved equal pay claims brought under Title VII, the *Gunther* court agreed

fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday. By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act. The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified. I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill.

If they will confirm that understanding, I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself one minute.

We were aware of the conflict that might develop because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

110 CONG. REC. 13647 (1964).

⁴⁹ 602 F.2d 882, 890, 20 FEP Cas. 792, 797 (9th Cir. 1979).

⁵⁰ *Id.*

⁵¹ Everett McKinley Dirksen, Republican Senator from Illinois.

⁵² 602 F.2d 882, 890, 20 FEP Cas. 792, 797 (9th Cir. 1979) (quoting 110 CONG. REC. 13647 (1964) (remarks of Senator Dirksen)).

⁵³ *Id.* at 890, 20 FEP Cas. at 797-98.

⁵⁴ See note 11 *supra* for a listing of the district court cases holding that the Bennett Amendment incorporates both the standards and the exceptions of the Equal Pay Act into Title VII.

⁵⁵ 602 F.2d 882, 891, 20 FEP Cas. 792, 798 (9th Cir. 1979).

that the Bennett Amendment dictated that they be "judged under Equal Pay standards."⁵⁶ The court stressed, however, that since these lower courts had not considered claims of discriminatory compensation based upon other than unequal pay for equal work allegations, their reasoning should not be extended to the "significantly different issue" raised by plaintiffs' alternative contention in *Gunther*.⁵⁷ Thus, while it deemed the Equal Pay Act's standards controlling whenever an equal pay claim is raised under Title VII, the *Gunther* court held that the Bennett Amendment does not preclude a plaintiff from litigating other forms of wage discrimination under Title VII unless the compensation practice is authorized by one of the four exceptions contained in the Equal Pay Act.⁵⁸

The *Gunther* court's analysis of the relationship between the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 is correct for several reasons. First, in holding equal pay claims litigated under Title VII subject to the Equal Pay Act's equal work requirement, the circuit court merely followed the accepted principle that the two statutes should be construed harmoniously.⁵⁹ Since an equal pay action may be brought under either statute, equal pay claims raised under Title VII must be decided in accordance with the principles prescribed by the Equal Pay Act in order to ensure consistent results under the statutes. The *Gunther* court's second determination, that all Title VII wage discrimination decisions, involving either equal pay or discriminatory compensation allegations must recognize the employment practices authorized by the Equal Pay Act's four exceptions, finds support in similar reasoning. If for example, an employer could be viewed as violating section 703(a)(1) of Title VII by differentiating wages pursuant to a plan explicitly authorized by the Equal Pay Act's exceptions, choice of statutes, rather than employment practices, would determine the outcome of many wage discrimination cases. Moreover, if these exceptions were not incorporated within section 703(a)(1), Title VII would directly nullify provisions of the Equal Pay Act in contravention of the clear legislative purpose underlying the Bennett Amendment.⁶⁰

As the *Gunther* court recognized, however, when a Title VII discriminatory compensation claim involves neither equal work nor an employment practice protected by the Equal Pay Act's exceptions, the two statutes no longer overlap, and hence the need for harmony disappears.⁶¹ Furthermore, in this instance, the Bennett Amendment does not dictate that Title VII be coordinated with the Equal Pay Act. For example, in defining the scope of section 703(a)(1), the Bennett Amendment provides that wage differentials *authorized* by the Equal Pay Act shall not be deemed unlawful under Title VII.⁶² Because the Equal Pay Act applies only to jobs involving the performance of equal

⁵⁶ *Id.*

⁵⁷ *Id.* The *Gunther* court noted that one district court case, *IUE v. Westinghouse Elec. Corp.*, 19 FEP Cas. 450 (D.N.J. 1979), did consider the issue of discriminatory compensation. Since the *IUE* court relied on lower court cases involving equal pay claims in deciding that Title VII should be deemed co-extensive with the Equal Pay Act, the circuit court saw "no reason to extend" its rationale to *Gunther*. 602 F.2d 882, 891, 20 FEP Cas. 792, 798 (9th Cir. 1979).

⁵⁸ *Id.*

⁵⁹ See text and note at note 10 *supra*.

⁶⁰ See text and notes at notes 48-50 *supra*.

⁶¹ 602 F.2d 882, 891, 20 FEP Cas. 792, 798 (9th Cir. 1979).

⁶² See text and note at note 9 *supra*.

work, it should not be construed as *authorizing* unjustifiably large pay differentials for unequal work, a situation which the Act does not purport to cover.⁶³ For these reasons, the *Gunther* court was correct in holding that the Bennett Amendment does not preclude employees from litigating discriminatory compensation practices under Title VII, even though these claims would not be cognizable under the Equal Pay Act.

The practical impact of the *Gunther* court's ruling is twofold. First, an increase in discriminatory compensation suits under Title VII can be anticipated. Since the Equal Pay Act and Title VII both provide remedies for wage discrimination, many district courts have construed the two statutes, not just harmoniously, but identically.⁶⁴ If the Ninth Circuit's interpretation of the Bennett Amendment is followed in other jurisdictions, however, employees can be expected to challenge unjustifiable wage differentials for comparable⁶⁵ or even unique work.⁶⁶ Specifically, although employees acknowledge the differences inherent in their jobs, under the *Gunther* holding they still may allege that their positions are sufficiently similar to those of higher-paid males to suggest that sex discrimination, and not the nature of the work performed, produced the wage discrepancy. An analogous but more difficult argument may be advanced by employees who hold totally unique positions, but who still allege that they would be paid a higher salary if not for sex discrimination.

The problem of proof inherent in this latter argument suggests the second ramification of the *Gunther* court's determination that relief under Title VII is not limited to situations entailing equal work. Although the basis for stating a cause of action has been increased by the Ninth Circuit's ruling, plaintiffs' chances of successfully proving their cases have not. When plaintiffs allege discriminatory compensation for unequal jobs, for example, their burden of proof changes from establishing the equality of the work performed to demonstrating the existence of sex discrimination. Specifically, plaintiffs suing under the Equal Pay Act must merely establish that the tangible skill, effort and responsibility required by their jobs are substantially equal to that required by the work of higher-paid males.⁶⁷ In a Title VII discriminatory compensation suit, however, the plaintiffs must establish the influence of sex discrimination as the causative factor in the wage differential.⁶⁸ Recognizing the difficulty in sustaining this burden, the *Gunther* court concluded "that problems of proof

⁶³ See 1 LARSON, EMPLOYMENT DISCRIMINATION, § 33.10 (1979).

⁶⁴ See text and notes at notes 11-12 *supra*.

⁶⁵ See note 3 *supra*.

⁶⁶ See *Rinkel v. Associated Pipeline Contractors*, 17 FEP Cas. 224 (D. Alaska 1978) where the court stated, "While the practice of paying a uniquely situated employee less than would be paid a member of the opposite sex in the same position may be a violation of certain laws and reprehensible, it does not violate this [Equal Pay Act]. . . ." *Id.* at 226.

⁶⁷ See note 3 *supra*.

⁶⁸ See *Pantchenko v. C.B. Dolge Co.*, 18 FEP Cas. 686, 689-90 (D. Conn. 1977), in which the district court stated,

Plaintiff has the burden of proving that she was paid less . . . because she is a woman. At most she has shown that she was slightly underpaid and that she is a woman. . . . While I do not find that plaintiff has established her contention that she worked at a level of equivalent responsibility with other chemists at the plant, the evidence does indicate that her work was of sufficient quality and responsibility, compared to the other chemists, to merit a salary slightly above what she was

may present substantial barriers to establishing this kind of discriminatory compensation claim. Such problems, however, are not sufficient reason to foreclose plaintiff[s] from the opportunity to establish a claim of discrimination."⁶⁹

V. ATTORNEY'S FEES*

Prevailing parties in federal litigation ordinarily are not entitled to recover reasonable attorney's fees¹ absent exceptional circumstances, such as a showing of the losing party's bad faith or an express congressional authorization of an award.² One statutory exception is section 706(k) of Title VII,³ which gives a court discretion to award reasonable attorney's fees to the prevailing party in employment discrimination suits. The Supreme Court has observed that in section 706(k) Congress intended to encourage aggrieved employees to serve as "private attorney[s] general" to vindicate their civil rights.⁴ Thus, the Court has interpreted section 706(k) to support awards to prevailing plaintiffs in all but special circumstances.⁵

In *Christiansburg Garment Co. v. EEOC*,⁶ the Court considered when a Title VII defendant may recover attorney's fees as a prevailing party under section 706(k).⁷ Examining legislative history, the Court determined that the section

receiving. But there is not a shred of evidence to indicate that her salary level was in any way related to her gender.

Id.

⁶⁹ 602 F.2d 882, 891, 20 FEP Cas. 792, 798 (9th Cir. 1979).

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¹ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). The "American Rule" contrasts with the English practice of regularly awarding counsel fees to the prevailing party. *Id.*

² *Id.* at 257-59.

³ 42 U.S.C. § 2000e-5(k) (1976). This section reads as follows:

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.

Id.

⁴ *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978). In the only specific reference to section 706(k) in Title VII's legislative history, Senator Hubert Humphrey explained that the provision was included to "make it easier for a plaintiff of limited means to bring a meritorious suit." 110 CONG. REC. 12724 (1964) (remarks of Senator Humphrey). The *Christiansburg* Court's conclusions regarding the purposes underlying section 706(k) were drawn primarily from its examination of the legislative history of the almost identical attorney's fee provision of Title II, 42 U.S.C. § 2000a-3(b) (1976). 434 U.S. at 416-17, 420.

⁵ *Id.* at 417. See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

⁶ 434 U.S. 412 (1978). For a full discussion of *Christiansburg*, see 1977-1978 *Annual Survey of Labor Relations and Employment Discrimination Law*, 20 B.C. L. REV. 61, 216 (1978).

⁷ 434 U.S. at 417-23. Prior to *Christiansburg*, some lower courts read the plain language of section 706(k) to dictate equal treatment for prevailing plaintiffs and defendants. See, e.g., *United States v. Allegheny-Ludlum Indus., Inc.*, 558 F.2d 742, 744, 15 FEP Cas. 583, 584 (5th Cir. 1977); *EEOC v. The Bailey Co., Inc.* 563 F.2d 439, 456, 15 FEP Cas. 972, 986 (6th Cir. 1977). Other courts imposed a more stringent standard upon prevailing defendants. They reasoned that a successful defense does not advance the Act's underlying anti-discrimination policy and that awards against plaintiffs might deter employees from initiating legitimate suits. See, e.g., *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1064, 11 FEP Cas. 1322, 1325 (8th

has a twofold purpose; it was designed as much to deter groundless claims as to encourage legitimate, meritorious actions.⁸ The *Christiansburg* Court sought to minimize the tension between these conflicting goals, while effectuating each to the fullest extent possible.⁹ Rejecting arguments that prevailing defendants should always recover fees,¹⁰ and that they should not recover unless bad faith is shown,¹¹ the Court held that attorney's fees may be awarded to a prevailing Title VII defendant only where the suit is found "frivolous, unreasonable, or groundless. . . ."¹² This standard was made stricter than that which applies to plaintiffs¹³ so that vigorous enforcement of meritorious civil rights claims would not be discouraged.¹⁴ Because it does not require a showing of bad faith,¹⁵ however, the standard offers defendants protection beyond that enjoyed at common law.¹⁶

Christiansburg's enunciation of a defendant's award standard, based on the Court's accommodation of the conflicting policies underlying section 706(k), is a valuable guide to the proper application of this provision. During the *Survey* year, however, several decisions were handed down which reveal that *Christiansburg* has not resolved all the problems encountered by the lower courts in awarding attorney's fees to prevailing defendants in employment discrimination suits.

A. *Substitution of a Subjective Standard for the Christiansburg Standard:*
*Bowers v. Kraft Foods Corp.*¹⁷

The *Christiansburg* opinion differentiated actions brought in bad faith from frivolous or meritless suits.¹⁸ Interpreting section 706(k) as offering defendants

Cir. 1975); *United States Steel Corp. v. United States*, 519 F.2d 359, 364, 10 FEP Cas. 1106, 1109 (3d Cir. 1975).

⁸ 434 U.S. at 420. See note 4 *supra*.

⁹ 434 U.S. at 420-22. The Court noted that defendant awards are warranted in some circumstances to effectuate Congress' intent to "protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420. It later warned, however, that assessing fees against plaintiffs whenever the defendant prevails "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.* at 422.

¹⁰ *Id.* The defendant-petitioner argued that, given the plain meaning of the statute, the standard which permits recovery of attorney's fees for almost all prevailing plaintiffs should apply equally to prevailing defendants. *Id.* at 417-18. The Court, however, rejected this "mechanical" construction, *id.* at 418, and focused its analysis on the legislative purposes of section 706(k). *Id.* at 420.

¹¹ *Id.* at 418. The respondent Commission contended that prevailing defendants should recover fees under section 706(k) only when the plaintiff's bad faith can be shown. *Id.* The Court countered that if this had been Congress' intent, the statutory provision would not have been necessary, because defendants can recover fees against bad faith plaintiffs at common law. *Id.* at 419.

¹² *Id.* at 422.

¹³ See text at note 5 *supra*.

¹⁴ 434 U.S. at 422.

¹⁵ *Id.* at 421. The Court made it clear that its standard "in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him." *Id.*

¹⁶ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975).

¹⁷ 606 F.2d 816, 20 FEP Cas. 1750 (8th Cir. 1979).

¹⁸ 434 U.S. at 422. The Court wrote:

a plaintiff should not be assessed his opponent's attorney's fees unless a court finds

more protection than at common law,¹⁹ the Supreme Court explained that a plaintiff's subjective bad faith is not a prerequisite to a defendant's award.²⁰ In the Court's view, fees may be assessed against plaintiffs where the defendant makes the less onerous showing of an objectively groundless or unreasonable action.²¹ In a recent decision, however, the Eighth Circuit reversed a fee award to a prevailing defendant in an employment discrimination suit because the plaintiff conceivably could have believed her claim to have merit. In *Bowers v. Kraft Foods Corp.*,²² the court relied on this conceivable belief to reject the trial court's findings that the suit was "frivolous," with "no foundation in fact," and "maliciously filed."²³ The Eighth Circuit's analysis ignores *Christiansburg's* suggestion that a lawsuit may be frivolous, unreasonable, and groundless, even though the plaintiff believes that she has brought a meritorious claim in good faith. It substitutes a purely subjective standard for that enunciated in *Christiansburg*. To the extent that this analysis lessens the protection defendants have been given from groundless claims, *Bowers* undermines the delicate policy reconciliation underlying the *Christiansburg* standard.

In *Bowers*, a black employee brought suit against her employer under Title VII and under 42 U.S.C. § 1981,²⁴ alleging racial discrimination in job classifications, promotions, and pay scale.²⁵ The Title VII claim was dismissed by the district court because it was not brought within ninety days of Bowers' receipt of a right to sue letter.²⁶ At trial on the merits of the section 1981 claim, the District Court for the Eastern District of Missouri found no evidence supporting Bowers' allegations.²⁷ The court noted that Bowers earned the same wages as employees with greater qualifications and responsibilities,²⁸ and found no evidence that she ever was denied a promotion or salary increase because of her race.²⁹ Finding plaintiff's work habits and attitude to be unsatisfactory,³⁰ the court rejected the argument that a supervisor's criticism of plaintiff's job performance was racially motivated.³¹ The trial court concluded

that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.

Id. (emphasis in original).

¹⁹ *Id.* at 419; see text and notes at notes 11 & 15-16 *supra*.

²⁰ 434 U.S. at 421.

²¹ *Id.*

²² 606 F.2d 816, 20 FEP Cas. 1750 (8th Cir. 1979).

²³ *Id.* at 818, 20 FEP Cas. at 1752.

²⁴ 42 U.S.C. § 1981 (1976) (providing for equal rights under the law).

²⁵ 606 F.2d at 817, 20 FEP Cas. at 1751.

²⁶ 467 F. Supp. 971, 974, 19 FEP Cas. 934, 937 (E.D. Miss. 1979).

²⁷ *Id.* at 972, 19 FEP Cas. at 935.

²⁸ *Id.* at 972, 974, 19 FEP Cas. at 935, 936-37. In addition, plaintiff's allegation that the hiring of two employees at a higher grade was racially motivated was rebutted by the court's finding that the two were highly experienced operators of a machine which the plaintiff was incapable of operating. *Id.* at 973, 19 FEP Cas. at 936.

²⁹ *Id.* at 973-74, 19 FEP Cas. at 936. Bowers was promoted once and received nine salary increases, which doubled her starting salary over eight years. *Id.*

³⁰ *Id.* The court also noted that plaintiff averaged ten absent days a year, compared to an average of less than three for the office as a whole. *Id.*

³¹ *Id.*

that the lawsuit was filed to punish the supervisor;³² that Bowers had "no foundation in fact for her lawsuit";³³ and that it was "a frivolous lawsuit maliciously filed."³⁴ Accordingly, the court entered judgment for the defendant and assessed attorney's fees against the plaintiff.³⁵

On appeal, the Eighth Circuit concluded that the record supported the lower court's determination that Bowers was not entitled to relief, and it affirmed the judgment on the merits.³⁶ It then examined Bowers' contention that the trial court had abused its discretion in awarding attorney's fees to the defendant.³⁷ The court first determined that the *Christiansburg* "frivolous, unreasonable, or groundless" standard applies to defendant awards in section 1981 litigation.³⁸ Purporting to apply this standard, the court reasoned:

Bowers' receipt of a right to sue letter, even though insufficient in itself to overcome the district court's findings of frivolity, could have led Bowers to reasonably believe that her claim was meritorious. Moreover, the evidence, while weak, was sufficient to conceivably have influenced Bowers to believe that she had a stronger case.³⁹

Thus, the circuit court concluded that Bowers' contentions were not so frivolous or malicious as to justify the assessment of attorney's fees against her,⁴⁰ and it reversed the lower court's award.⁴¹

The Eighth Circuit swept too broadly in using Bowers' conceivable beliefs to reject all three components of the trial court's characterization of the claim. The court might have avoided this error had it analyzed the lower court's "maliciously filed" finding separately from the "frivolous" and "no foundation in fact" findings.⁴² In rejecting the "maliciously filed" component, the Eighth Circuit properly focused on the plaintiff's state of mind. Such a

³² *Id.* at 973, 19 FEP Cas. at 936.

³³ *Id.* at 974, 19 FEP Cas. at 937.

³⁴ *Id.*

³⁵ *Id.* The district court did not mention the standard it applied in exercising its discretion to award attorney's fees. Presumably, its analysis was similar to that of the Eighth Circuit, which concluded that *Christiansburg* governed the award in the instant case. See text and note at note 38 *infra*.

³⁶ 606 F.2d at 818, 20 FEP Cas. at 1751-52.

³⁷ *Id.*

³⁸ *Id.* The award of attorney's fees in section 1981 actions is governed by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), which contains language substantially identical to section 706(k). See 606 F.2d at 818 n.2, 20 FEP Cas. at 1752 n.2. The Senate Report of the 1976 Act explains that it "follows the language of Title II and VII of the Civil Rights Act of 1964" and that "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. REP. NO. 94-1011, 94th Cong., 2d. Sess. 2, 4, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912. The Eighth Circuit in *Bowers* implicitly recognized and adhered to this congressional intent by applying the *Christiansburg* standard in its review of Bowers' claim under section 1981. 606 F.2d at 818, 20 FEP Cas. at 1752. See also *Copeland v. Martinez*, 603 F.2d 981, 988, 20 FEP Cas. 330, 334 (D.C. Cir. 1979); *Patzkowski v. United States*, 576 F.2d 134, 138 (8th Cir. 1978).

³⁹ 606 F.2d at 818, 20 FEP Cas. at 1752.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² As mentioned, see text at notes 33-34 *supra*, the lower court based its award of attorney's fees on its findings that Bowers had "no foundation in fact for her lawsuit" and that it was "a frivolous lawsuit maliciously filed." 467 F. Supp. at 974, 19 FEP Cas. at 937. These are,

characterization does not stem from an objective evaluation of the claim's merits. A court's decision that a claim is "maliciously filed" is predicated upon the plaintiff's conduct; it essentially charges the plaintiff with bad faith. The circuit court understandably was reluctant to sustain such a charge where the evidence with respect to Bowers' motives was ambiguous.

The same analysis does not apply, however, to the "frivolous" and "no foundation in fact" findings. Following *Christiansburg*'s announcement that defendants should be protected from frivolous, unreasonable, and groundless actions, as well as from claims brought in bad faith, the *Bowers* court ought not to have limited its inquiry to the plaintiff's state of mind. It also should have examined objectively the merits of the lawsuit. In this manner, it would not have rejected the frivolous and without foundation findings solely because of Bowers' evaluation of her claim and her conceivable belief that the action had merit.

The Eighth Circuit's limited inquiry may have been prompted by dicta in *Christiansburg*. The Supreme Court admonished lower courts not to characterize a suit as unreasonable simply because the plaintiff does not prevail.⁴³ The Court explained that "[t]his kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success."⁴⁴ This language arguably supports the Eighth Circuit's subjective standard, which both avoids post hoc reasoning and mitigates the deterrent effect of defendant awards. The dicta must be read, however, in conjunction with *Christiansburg*'s holding, which allows defendant awards where the claim is without foundation.⁴⁵ The Supreme Court was advising lower courts to look beyond the outcome of litigation in objectively evaluating a suit's merits. It was not suggesting that, in examining a claim at its inception, a court must limit its inquiry to the plaintiff's state of mind.

Similarly, the *Bowers* court should not have been influenced by an apprehension of deterring legitimate claims into lessening the protection defendants enjoy under *Christiansburg*. The policy of encouraging meritorious civil rights actions already is embodied in the *Christiansburg* standard.⁴⁶ The Supreme Court appreciated that it sacrificed some of this policy's impact in reconciling the dual purposes of section 706(k). Barring a modification or overruling of *Christiansburg*, courts must adhere to its policy accommodation. In exercising their discretion in awarding attorney's fees under the *Christiansburg* standard, courts must look beyond the plaintiff's beliefs and determine objectively the merits of the claim.

**B. Amount of Attorney's Fees Awarded to Prevailing Title VII Plaintiffs and Defendants:
*Faraci v. Hickey-Freeman Co.***

Christiansburg established when a plaintiff may be liable for a prevailing defendant's attorney's fees. It did not address, however, whether the standard

essentially, three separate findings. The Eighth Circuit ought not to have reversed the fee award without examining each component of the findings which supported the district court's exercise of its discretion to assess attorney's fees.

⁴³ 434 U.S. at 421-22.

⁴⁴ *Id.* at 422.

⁴⁵ *Id.* at 421, 422. See text at notes 18-21 *supra*.

⁴⁶ See text at notes 8-14 *supra*.

for determining the *amount* of reasonable fees should differ as between prevailing plaintiffs and prevailing defendants. Prior to *Christiansburg*, in *Johnson v. Georgia Highway Express Inc.*,⁴⁷ the Fifth Circuit developed a formula for determining the amount of plaintiff awards.⁴⁸ This formula was designed to encourage vigorous enforcement of Title VII by any aggrieved employee, rich or poor, by entitling counsel for prevailing private plaintiffs to fair and adequate compensation for their litigious efforts.⁴⁹ It has been widely applied to plaintiff awards by other courts,⁵⁰ and it is well supported by the policy underlying plaintiff awards recognized by the Supreme Court in *Christiansburg*.⁵¹ Following *Christiansburg*'s enunciation of different theories and standards underlying plaintiff and defendant awards,⁵² however, a split has emerged between two of the circuit courts as to whether the *Georgia Highway Express* compensatory standard should apply equally to prevailing defendants.

In two recent decisions the Court of Appeals for the Fifth Circuit expressed its view that the *Georgia Highway Express* criteria should determine the amount of a prevailing Title VII defendant's attorney's fee award. In *Davis v. Roadway Express, Inc.*,⁵³ the plaintiff appealed from a directed verdict for her former employer in a suit alleging, *inter alia*, violations of Title VII.⁵⁴ The Fifth Circuit noted that in appealing only the class action issues without also appealing the judgment on her individual claim, Davis had ignored clear and well-established law denying her standing.⁵⁵ The court concluded that Davis had continued to litigate after her claim had become "clearly groundless."⁵⁶ Accordingly, the defendant, Roadway, was awarded that part of its attorney's fees which related to the appeal.⁵⁷ The court reasoned that *Georgia Highway Express* should govern defendants' fee awards, and it instructed Roadway to ad-

⁴⁷ 488 F.2d 714, 7 FEP Cas. 1 (5th Cir. 1974).

⁴⁸ *Id.* at 717-19, 7 FEP Cas. at 3-5. The criteria are (1) time and labor required, (2) novelty and difficulty of the questions, (3) skill needed, (4) preclusion of other employment by the attorney, (5) customary fee, (6) the type of fee — fixed or contingent, (7) time limitations or other circumstances imposed by the client, (8) amount involved and results obtained, (9) experience, reputation, and ability of the attorneys, (10) "undesirability" of the case, (11) nature and length of the professional relationship with the client, and (12) awards in similar cases. *Id.*

⁴⁹ *Id.* at 716, 719-20, 7 FEP Cas. at 2, 5.

⁵⁰ See, e.g., *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 13 FEP Cas. 578 (S.D. Tex. 1976); *Parker v. Mathews*, 411 F. Supp. 1059, 13 FEP Cas. 595 (D.D.C. 1976); *Lockheed Minority Solidarity Coalition v. Lockheed Missiles and Space Co.*, 406 F. Supp. 828, 20 FEP Cas. 677 (N.D. Cal. 1976). For a more complete list of cases utilizing the *Georgia Highway Express* criteria with respect to prevailing plaintiffs, see Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard*, 8 U. TOL. L. REV. 259, 265 n.31 (1977).

⁵¹ See text at note 4 *supra*.

⁵² See text at notes 4-16 *supra*.

⁵³ 590 F.2d 140, 19 FEP Cas. 243 (5th Cir. 1979).

⁵⁴ *Id.* at 141, 19 FEP Cas. at 244.

⁵⁵ *Id.* at 143, 19 FEP Cas. at 245. The district court ruled that the complaint was of an individual nature and that it could not proceed as a class action. 19 FEP Cas. 241, 242 (S.D. Tex. 1977). Then, at the trial of the individual claim, the district court concluded that the plaintiff had failed to establish even a prima facie case of discrimination, and, accordingly, it entered judgment for the defendant. *Id.* at 243. On appeal, Davis raised only the class action issues. 590 F.2d at 143, 19 FEP Cas. at 245. The Fifth Circuit ruled that Davis lacked standing to appeal the class action issues, since she had not appealed the judgment on her individual claim. *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

dress its motion for attorney's fees to the compensatory factors set forth in that opinion.⁵⁸

Three months later, in *EEOC v. First Alabama Bank of Montgomery*,⁵⁹ the Fifth Circuit again demonstrated that it does not read *Christiansburg* as requiring the adoption of a dual standard for calculating the amount of attorney's fee awards. The EEOC brought an action under Title VII to compel compliance with an earlier court order.⁶⁰ Noting that the action was based on "nebulous grounds" and that there was no evidence to sustain plaintiff's theory,⁶¹ the district court granted the defendant bank's motion for summary judgment.⁶² In a hearing on the defendant's motion for attorney's fees, held prior to the *Christiansburg* decision, the district court ruled that the bank, as the prevailing party, was entitled to such fees.⁶³ Explaining that in its determination of reasonable attorney's fees a court is not to differentiate between prevailing plaintiffs and prevailing defendants,⁶⁴ the district court listed the *Georgia Highway Express* criteria as governing its calculation of defendant's fee award.⁶⁵ On appeal following the *Christiansburg* decision, the Fifth Circuit held that the district court's finding of no evidence to support EEOC's claim fit within the *Christiansburg* standard of a groundless or unreasonable suit.⁶⁶ More importantly for this discussion, the circuit court was willing to affirm the district court's judgment with respect to the amount of attorney's fees,⁶⁷ notwithstanding the lower court's reliance on *Georgia Highway Express* and its assertion that no distinction should be made between plaintiffs and defendants in this regard.

Unlike its brethren on the Fifth Circuit, the Second Circuit recently revealed that it would conduct a broader inquiry than that of *Georgia Highway Express* when calculating the amount of a prevailing defendant's fee award. *Faraci v. Hickey-Freeman Co., Inc.*⁶⁸ involved a plaintiff's appeal from the district court's dismissal of his Title VII action as frivolous and its award of attorney's fees to the prevailing defendant.⁶⁹ On appeal, the Court of Appeals for the Second Circuit affirmed the dismissal of the complaint.⁷⁰ It also refused to disturb the lower court's conclusion that since the action was frivolous and unreasonable, *Christiansburg* allowed the award of attorney's fees to the defendants.⁷¹ The court then explained that determining a party's eligibility for attorney's fees does not end the inquiry; a court also must ascertain the proper

⁵⁸ *Id.* at 143, 19 FEP Cas. at 246. For a list of the factors set forth in *Georgia Highway Express*, see note 48 *supra*.

⁵⁹ 595 F.2d 1050, 19 FEP Cas. 1747 (5th Cir. 1979).

⁶⁰ *EEOC v. First Alabama Bank of Montgomery*, 426 F. Supp. 328, 19 FEP Cas. 1744 (M.D. Ala. 1977). The earlier court order was issued in *Henderson v. First National Bank of Montgomery*, 360 F. Supp. 531, 6 FEP Cas. 859 (M.D. Ala. 1973).

⁶¹ 426 F. Supp. at 331, 19 FEP Cas. at 1745.

⁶² *Id.*

⁶³ 19 FEP Cas. 1746 (M.D. Ala. 1977).

⁶⁴ *Id.*

⁶⁵ *Id.* at 1746-47.

⁶⁶ 595 F.2d at 1056, 19 FEP Cas. at 1751.

⁶⁷ *Id.*

⁶⁸ 607 F.2d 1025, 20 FEP Cas. 1777 (2d Cir. 1979).

⁶⁹ *Id.* at 1027, 20 FEP Cas. at 1778-79.

⁷⁰ *Id.*, 20 FEP Cas. at 1779.

⁷¹ *Id.* at 1028, 20 FEP Cas. at 1780.

amount of the award.⁷² In delineating the factors that should enter into a district court's calculation, the Second Circuit wrote that the amount should "first of all, reflect a reasonable compensation for work done, tempered by a concern for the difficulty of the case and quality of the advocacy."⁷³ This compensatory criterion fits well within the contours of the *Georgia Highway Express* standard, which had been both formulated and extended to defendant awards by the Fifth Circuit.⁷⁴ The *Faraci* court departed from the Fifth Circuit's analysis, however, when it included two additional, non-compensatory factors in the equation — the plaintiff's financial status and his degree of good faith in prosecuting the action.⁷⁵ The court explained that a fee award should both effectuate the broad legislative purposes of section 706(k) and reflect the equities in the instant case.⁷⁶ The Second Circuit concluded that Faraci's limited ability to pay⁷⁷ and his "readily apparent" good faith⁷⁸ warranted a reduction of the fee award.⁷⁹ The court determined that an assessment of \$200 would fulfill the deterrent function⁸⁰ of section 706(k) without subjecting the plaintiff to financial ruin.⁸¹ Accordingly, it remanded the case for the district court to enter an order reducing the fee award from \$2,500 to \$200.⁸²

The approach of the Second Circuit is preferable to that of the Fifth Circuit, due to its more appropriate reading of the *Christiansburg* opinion. Both circuits correctly applied the *Christiansburg* standard for determining whether the prevailing defendant could recover attorney's fees. The Second Circuit, however, was more sensitive to the Supreme Court's policy reconciliation upon which this standard is based. *Christiansburg* explained that although plaintiff awards under section 706(k) are supported exclusively by the policy of encouraging vigorous enforcement of civil rights claims,⁸³ the standards governing defendant awards must reconcile this enforcement policy with that of deterring groundless claims.⁸⁴ The Second Circuit's decision to amend the *Georgia Highway Express* standard with respect to prevailing defendants accords well with the Supreme Court's recognition of the different policy considerations supporting plaintiff and defendant awards, and it parallels *Christiansburg's* enunciation of a separate standard governing defendant awards.

The Fifth Circuit's extension of the *Georgia Highway Express* compensatory standards to defendant awards fosters one of the policies recognized by the *Christiansburg* Court to underlie section 706(k). Plaintiffs certainly will be de-

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See text and notes at notes 47-49 & 53-67 *supra*.

⁷⁵ 607 F.2d at 1028-29, 20 FEP Cas. at 1780.

⁷⁶ *Id.*

⁷⁷ The court noted that Faraci's expenses for food, shelter, and medicine consumed \$399 of his \$462 monthly income. *Id.* at 1028, 20 FEP Cas. at 1780.

⁷⁸ *Id.* at 1029, 20 FEP Cas. at 1780.

⁷⁹ *Id.*

⁸⁰ The court continually emphasized the "deterrent purpose" of section 706(k), as well as the "congressional goal of discouraging frivolous litigation." *Id.* at 1028-29, 20 FEP Cas. at 1780.

⁸¹ *Id.* at 1029, 20 FEP Cas. at 1780.

⁸² *Id.*

⁸³ 434 U.S. at 416-17, 420; see text at note 4 *supra*.

⁸⁴ *Id.* at 420-22; see text at notes 8-16 *supra*.

tered from initiating frivolous claims where they face the prospect of the huge assessments that full reimbursement of their adversaries' expenses entails. To the extent that employees also are dissuaded from bringing *legitimate* civil rights actions, however, the decrease in meritless suits is at the expense of the policy of vindicating civil rights violations. Thus, the Fifth Circuit's approach may exact a higher price than is warranted by the *Christiansburg* Court's implicit admonition against overly broad deterrents.⁸⁵

The Second Circuit's *Faraci* analysis effectively considers and reconciles *both* policies supporting defendant awards under section 706(k). The same fear of chilling meritorious claims that led the Supreme Court to adopt a stricter standard than that which applies to plaintiffs for determining when defendants can be awarded attorney's fees,⁸⁶ also supports the Second Circuit's decision to consider additional factors in its calculation of the *amount* of defendant awards. The *Faraci* analysis, by amending the *Georgia Highway Express* standard with respect to defendant awards to include the plaintiff's ability to pay and his degree of good faith, seems calculated to mitigate the chilling effect of the Fifth Circuit's approach, while still adequately deterring groundless suits. The court will assess full fees where possible — that is, where the losing plaintiff can "afford" it.⁸⁷ It will set a lesser amount, however, where the compensatory figure would subject the plaintiff to financial ruin and where the lesser sum is still a large enough proportion of the plaintiff's disposable income to effectuate the deterrent purpose of section 706(k).⁸⁸ Presumably, the prospect of a heavy debt burden is less chilling than that of financial ruin. To the same effect is the *Faraci* court's second additional criterion of good faith. A positive correlation exists between a plaintiff's degree of good faith and his ability to ascertain in advance whether he may be found liable for the attorney's fees of his opponent.⁸⁹ Because there is less of a chill where a plaintiff can predict more accurately his potential liability, the Second Circuit's efforts to tailor the amount of the defendant's award to the plaintiff's degree of good faith go far towards mitigating the adverse effects of a purely compensatory standard as applied to prevailing Title VII defendants.

⁸⁵ The Supreme Court warned in *Christiansburg*:

That § 706(k) allows fee awards only to *prevailing* private plaintiffs should assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success. To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.

Id. at 422 (emphasis in original).

⁸⁶ The *Christiansburg* standard is stricter than that which applies to plaintiffs, in the sense that it is not enough that a defendant prevail in order to be eligible for attorney's fees. The defendant must also show that the suit was frivolous or unreasonable. See text and notes at notes 10-14 *supra*.

⁸⁷ 607 F.2d at 1028, 20 FEP Cas. at 1780. The court reasoned that a wealthy plaintiff would be deterred from initiating frivolous suits only if the full amount of attorney's fees were levied against it. *Id.*

⁸⁸ *Id.* at 1029, 20 FEP Cas. at 1780.

⁸⁹ *Christiansburg* contains dictum which recognizes a significant difference between an unreasonable claim on the one hand, and an unreasonable claim brought in bad faith on the

For the foregoing reasons, courts which have not yet examined this issue should be persuaded to adopt *Faraci's* amendments to the purely compensatory *Georgia Highway Express* criteria when determining the amount of a prevailing Title VII defendant's attorney's fee award. In so doing, the lower courts properly may reconcile the divergent policies implicit in section 706(k) in a manner consistent with the Supreme Court's *Christiansburg* analysis.

other. The Court explained that in the latter case there is an even stronger basis for assessing the defendant's attorney's fees against the plaintiff. 434 U.S. at 422; see note 18 *supra*. Although the Court did not detail its reasoning, it seems likely that this dictum was prompted by two considerations. First, a plaintiff is more culpable when he prosecutes in bad faith than when he initiates a suit wrongly believing that it is reasonable. Second, the distinction between suits brought in bad faith and meritorious claims is greater than the distinction between suits brought in good faith which are subsequently found to be groundless and meritorious claims. This second consideration supports the contention that there is a positive correlation between the plaintiff's degree of good faith and his ability to predict his potential liability for the defendant's attorney's fees.